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State Imposed Anchorage Laws: Legitimate Practice, or Unconstitutional Restriction of Navigation?

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STATE IMPOSED ANCHORAGE LAWS: LEGITIMATE PRACTICE, OR UNCONSTITUTIONAL RESTRICTION OF NAVIGATION?

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ABSTRACT

In recent times, there has been a proliferation of laws enacted by individual states and townships which restrict the ability of mariners to anchor within navigable waters of the United States. These laws have been enacted in many of the coastal states, but are most prevalent in California, Florida and Hawaii. Uncertainty as to whether anchoring is an act of navigation, thereby being a constitutional right, has resulted in confusion among boaters, legal authorities and policy makers. In an attempt to clarify the uncertainty surrounding this issue, a lawsuit challenging the constitutionality of anchoring laws within the State of Hawaii has come before the public eye. Although the Hawaiian lawsuit is focused solely upon anchoring laws which affect that state, the ultimate outcome of the case could set precedent for this issue on a national basis.

As case history has been unhelpfully silent in the resolution of the anchoring issue, primary legal doctrines, such as the United States Constitution, the public trust doctrine and legal traditions practiced since the Institutes of Justinian law must provide some of the essential guidelines. Also of importance are the opinions of federal agencies, such as the Coast Guard, and Army Corps of engineers.

The following study addresses the current state of the

anchoring conflict, explains the importance of a solution, examines the documents which affect the issue, and proposes conclusions based on logic, history, and the guidelines set forth in the surveyed primary data. The conclusions support the proposals that anchoring can be proven to be an act of navigation, laws which restrict anchoring likewise restrict constitutional rights, and that anchoring laws may be deemed to be unconstitutional.

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I am grateful to all who were instrumental in helping me get through it all...you all know who you are.

Praise must also be given to the computers and instant-access information systems of the world...
...yet there is still much to be said of libraries and non-electronic research

Finally, to Mom, Dad, and Chris...
I Promise to talk about something else for a change!!!

Waiter,....I'll take my check now please.

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A. Intoduction

Across the nation, the headlines resound: "Anchoring Rights Topic of Conference"[1], "N.Y. Boaters Form Rights Group In Response To Anchoring Limits"[2], "Mooring Ordinance Challenged"[3], "Anchoring Rules Coming"[4], and "Hawaii Suit Aims To Block Tough New Anchorage Law".[5] The headlines address problems which have emerged from a recent proliferation of state-imposed anchorage laws.

A number of coastal states have recently enacted laws which restrict free anchoring in navigable waters of the United States.[6] Uncertainty as to whether anchoring is a constitutional right has resulted in confusion among boaters, legal authorities and policy makers. As a result, conflicts have occurred and the constitutionality of laws which impose

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[1] Soundings, December, 1992.

[2] Soundings, June, 1993.

[3] Sarasota Herald-Tribune, September 17, 1990.

[4] Soundings, December, 1992.

[5] Soundings, January, 1993.

[6] Jim Flannery, "Anchoring Rules Coming", Soundings, December, 1992.

restrictions on free anchoring has been questioned.[7]

Anchoring laws often originate through state legislation which has been established either to regulate environmental resources, or delineate state power over waters and navigation.[8] State legislation over marine resources is established through the Submerged Lands Act of 1953.[9] The Act grants paramount authority to the state, with the exception that the federal government retains its navigation servitude,[10] for the "constitutional purposes of commerce, navigation, national defense and international affairs."[11]

At this juncture, it is important to distinguish between two maritime terms which, because of their similarities, may be a potential source of confusion during subsequent stages of the analysis. In particular, these terms are "anchoring" and "mooring". "Anchoring" entails the use of an anchor or similar weight to prevent a vessel from moving significantly over an

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[7] Flannery, "Hawaii suit to block tough new anchorage law", Soundings, January, 1993. The case in question, Hawaiian Navigable Waters Preservation Society v. State of Hawaii 823 F. Supp. 766 (1993), challenges the constitutionality of Hawaiian anchorage laws.

[8] Id. at 53.

[9] Submerged Lands Act, 43 U.S.C., Sec. 1314 et. seq.

[10] Kalo, Coastal and Ocean Law, 1990: 147. The navigation servitude is the paramount right of the federal government, under the Commerce Clause of the U.S. Constitution to compel the removal of any obstruction to navigation.

[11] Submerged Lands Act, 43 U.S.C., Sec. 1314.

area of submerged land to which the vessel is affixed by means of such anchor, weight, chain and length of rope. The anchor, or weight is typically carried aboard such vessel when the vessel is not anchored.

"Mooring" entails the act of securing a vessel over an area of submerged land by means of affixing such vessel to an anchor or weight which is permanently, or semi-permanently located on such submerged land. This anchor, or weight is refered to as a "mooring". Moorings are typically installed and maintained by individuals or state agencies which have been granted permits to install and collect revenues from such moorings. The following research is concerned solely with state-imposed laws which place restrictions on anchoring.

The constitutionality of state-imposed regulations and restrictions on anchoring was recently challenged in a class action suit initiated by a boater interest group against the State of Hawaii.[12] The case, Hawaiian Navigable Waters Preservation Society v. State of Hawaii, (HNWPS v. Hawaii), was heard before the U.S. District Court for the State of Hawaii on March 5, 1993. The court upheld the authority of the state in imposing restrictions on anchoring.[13] Shortly after the District Court decision, the plaintiffs filed for an appeal, and although a hearing date has not yet been

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[12] Hawaiian Navigable Waters Preservation Society V. State of Hawaii, 823 F. Supp. 766 (1993).

[13] Id.

determined, the case will be heard in the 9th Circuit Court of Appeals, in San Francisco, California.[14] This case is the only one to date in which the constitutionality of anchoring laws has been, and continues to be challenged.

There are various statutes, legal doctrines and legal opinions which constitute the primary guidelines along which the question of jurisdiction (and hence the constitutionality) of anchoring laws may be resolved.[15] These include the Submerged Lands Act, the navigation servitude, the public trust doctrine,[16] and a legal opinion submitted by the Coast Guard on matters concerning federal versus state regulation of anchoring.[17]

The Submerged Lands Act provides the basis upon which states have enacted laws which regulate anchoring. States are limited in their authority by federal preemption in regulating matters concerning navigation, as established in the navigation servitude. If state regulations do not trespass

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[14] HNWPS v. Hawaii, Civil Docket, U.S. District Court For the District of Hawaii, Nov 4, 1993: 8.

[15] HNWPS v. Hawaii, 823 F. Supp. 766; 1993. Some of the sources examined by the District Court include the Submerged Lands Act of 1953, the Commerce Clause, the January, 1993 Coast Guard legal opinion, various Hawaiian Session Laws, the Equal Protection Clause, and various legal cases.

[16] Mark Amaral and Virginia Lee, Public Rights to Coastal Waters: Applying the Public Trust Doctrine, Rhode Island, Coastal Resources Center, 1992: xxi. Traditional rights enjoyed by the public within public trust areas are those of fishing, fowling, navigation and recreation.

[17] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992.

within the boundaries of the federal navigation servitude, then such state regulations may be permissible. However, if anchoring is an act associated with navigation, then laws which regulate anchoring may be subject to federal preemption.

In January, 1993, the Commandant's office of the Coast Guard released a legal opinion in which it addressed its position with regard to federal versus state regulation of anchoring. The Coast Guard took the position that it had joint jurisdiction with the states over navigable waters. The validity of the Coast Guard opinion has recently been questioned, as evidenced by the fact that Rep. Gerry Studds, Chairman of the Committee on Merchant Marine and Fisheries, has ordered a congressional review of the document.[18] There is substantial evidence indicating that it may be the Army Corps of Engineers that is responsible for monitoring some matters which affect navigation.[19]

The Public Trust Doctrine reserves certain constitutional rights for the general public. Historically, the common law rights of the public in public trust lands and waters are

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[18] Id. Also telephone interview with Joan Bondareff, Coast Guard Group, Committee on Merchant Marine and Fisheries, Washington, D.C., (202) 226-3500, March 30, 1994. Bondareff indicated that the congressional review has not yet occurred and that no date has been set for such review.

[19] Kalo, Coastal and Ocean Law, 1990: 171. Congress, through various acts, has granted to the Secretary of the Army the powers to maintain the navigability of the waters of the United States. In turn, the Secretary of the Army has delegated that responsibility to the Corps.

related to "commerce, fishing recreation and navigation."[20] Each state holds a public trust interest in its areas which are deemed as being navigable.[21] Thus, it is the responsibility of the state to assure the public of its rights to the same areas. If a law which is enacted by a state impinges upon established public trust rights, such as navigation and recreation, such a law may be deemed unconstitutional.

As yet, no legal precedent has been established to define the parameters of anchoring laws in association with the federal navigation servitude or the public rights of navigation and recreation. Likewise, the question of whether regulatory authority should fall into state or federal hands has not been clearly answered. Only after these questions have been addressed shall it be possible to determine whether anchoring laws are permissible state activities, or in fact unconstitutional encroachments on federal and public rights.

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[20] Mark Amaral and Virginia Lee, Public Rights to Coastal Waters, "Applying the Public Trust Doctrine", Rhode Island, Coastal Resources Center, 1992: xxi.

[21] Id.

B. Scope of the Problem

As the proliferation of anchoring laws continues, there has been a considerable backlash in the form of a negative response to such laws among the boating community. This has resulted in the establishment of boater-rights-oriented activist groups, informative publications[22], legal confrontations, legal defense groups, and an outpouring of editorials and official statements challenging the constitutionality of such laws.

The extent to which some activist groups have expressed dissatisfaction with anchorage laws may be seen in the following excerpt from an editorial written by Edwin Hager, founder of Boater Rights, a group based in Bradenton, Florida:

> With complete disregard for State and Federal laws...the Longboat Key Town Commission is once again trying to rewrite both State and Federal law. [A] Proposed ordinance [regulating] Anchored Vessels and Liveaboards is nothing more than another unconstitutional attempt to take away the rights of the public....My ancestors died in bloody wars to defend the Constitution and the freedom that we claim as citizens of the United States. How can I accept these freedoms without the same conviction?[23]

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[22] One example of an "informative publication" is Harry Phillips' Your Right To Anchor, Analemma House, Lake Park, Fla. 1988. The publication takes a quasi-legal approach towards constitutional factors involved in anchoring rights.

[23] Edwin Hager, Editorial sent to and subsequently printed in The Longboat Observer, Aug. 23, 1990.

The almost militant style with which Hager expresses his conviction against laws which may impinge upon constitutional rights is likewise reflected in a periodical distributed by the Sailors Total Anchoring Rights Society (STARS):

> ...All boaters have the right to use our federal waters system without the harassment of the local police and without the invalid ordinances that are being written to usurp these rights. The only way we are going to gain these rights is to SUE THE BASTARDS!...We are going to find each ordinance that is attempting to limit the rights of boaters to anchor and otherwise use our federal waters, and we are going to file suit in...a federal court.[24]

While boater interest groups have expressed a considerable amount of sentiment against state-imposed laws restricting anchoring, riparian land owners have expressed opinions commensurate in fervor with those of the boaters, yet in the opposite extreme. Although research has not indicated the existence of any riparian land owner interest groups, some of the opinions of this obviously interested group may be taken into account, again, through published editorials. The following excerpt is indicative of one riparian land owner's point of view:

> [With regard to anchoring laws]...I can see a 24-hour limit on anchoring in some areas and pretty much a maximum of 72 hours in other less populated places. Here in Florida we've all seen some rather scruffy live aboard-on-the-cheap types that you would not want

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[24] Harry Phillips, STARS, Winter, 1989, Vol. 1 No. IV: 2-3.

anchored in your backyard.[25]

This point of view is echoed in the following excerpt from a letter which appeared in the same publication:

> I, for one, think that tougher laws are required for anchoring especially in southeast Florida due to the crack-pot mentality of these sailboat owners. If the local municipalities let these people have their way, no one would be able to navigate the ICW [Intracoastal Waterway] without running into an illegally anchored sailboat....I will continue to push for stronger laws to prohibit all overnight anchoring in the ICW and maybe the outright banning of all sailboats.[26]

As it can be seen, a radical difference exists between the points of view of both boater-rights interest groups and riparian land owners. While both parties may be seen as expressing their views in the extreme, these views are ultimately heard by local, state and federal legislators, and play a major role in the subsequent establishment of laws. It is the obligation of the state, through the Coastal Zone Management Act (CZMA), "to preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone..."[27] Typically, this is accomplished through proper coastal zone management. In theory, proper coastal zone management assures that all public and private

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[25] Resident of El Jobean, Fla., Boat U.S. Reports, Vol. XXVIII, May, 1993: 6.

[26] Id.

[27] Coastal Zone Management Act of 1972, 16 U.S.C. Sec. 303: 1.

interests are taken into account while examining issues relative to the coastal zone. Ultimately, the goal of lawmakers involved in coastal zone management is to strike a balance, wherein all parties involved may be appeased. Unfortunately, as is often the case, the affected parties may not always be completely satisfied with the decisions of the lawmakers.

While both state and local authorities have typically assumed active roles in coastal zone management and the anchoring conflict, the involvement of Federal agencies has typically been characterized as one of detached observation. This is evidenced in part by Executive Order 12612 of 26, October, 1987.[28] This order on "federalism" mandates that all Federal agencies are to avoid the assertion of preemption of state and local government action. Under this Order, Federal agencies may commence preemption claims only where a Federal statute contains an express preemption provision or where there is clear evidence that Congress intended to so preempt.[29]

As of yet, the only Federal agency which has been continually involved in the anchoring issue has been the U.S. Coast Guard. Although the Coast Guard has been involved to the extent of following up on correspondence and issuing legal opinions, it has still taken more of a passive, rather than

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[28] Executive Order #12612, "Federalism", Oct. 26, 1987.

[29] Id.

active role in conflict resolution. This may be seen in the following Coast Guard statements:

> [In reference to direct Coast Guard intervention in the anchoring conflict] The Coast Guard's long-standing policy not to assume a legal position when a state proposes to regulate, restrict, or prohibit navigation except in situations that lead to direct conflict with Federal laws and regulations administered and enforced by the Coast Guard will continue.[30]

> ...It is more appropriate for issues such as whether the state action [in regulating anchoring] is prohibited by the supremacy clause of the constitution to be resolved by the courts or through state political processes [rather than through Coast Guard intervention].[31]

As it can be seen, the ongoing conflict concerning laws which impose restrictions on anchoring in the navigable waters of the United States is one which has been characterized by multiple, oftentimes divergent points of view. It has also been punctuated by both legal challenges and opinions. The crux of the anchoring conflict ultimately lies in the relation of anchoring to navigation. Once a definition of anchoring in relation to navigation is legally established, a significant milestone will have been reached in the struggle to resolve anchoring conflicts.

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[30] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992: 3.

[31] Commander, Seventh Coast Guard District, Memorandum #16636, Serial: 0874, June, 1991.

C. Advantages of Resolution

The anchoring conflict has been selected as the subject of this study for two reasons: its relevance to the field of marine affairs and its current development as a controversial issue in constitutional law. Within the scope of marine affairs, anchoring laws fall into the more specific category of coastal zone management. Interests in the coastal zone are both wide and varied, so that the intrinsic nature of coastal zone management is to provide some sort of balance in attempting to meet these needs. Needless to say, existing legislation does not always completely meet every constituent's needs, and the result often takes the form of conflicts such as those which currently exist between boater groups and the state of Hawaii. In this respect, coastal zone management may be the most effective means by which to resolve these differences.

One of the elements of the study is a focus on a currently developing case involving a challenge to the constitutionality of existing laws. As these laws deal with marine-related issues, the outcome will be of major significance to both the fields of maritime and constitutional law. Ultimately this study may aid in the compilation of data which could prove to be helpful in the resolution of such issues.

The first objective of this study is to provide a comprehensive review of the anchoring conflict and establish its relationship with the Submerged Lands Act, the Commerce Clause (navigation servitude) and the Public Trust Doctrine. The second objective is to clarify the question of Coast Guard vs. Army Corps of Engineers jurisdiction over anchoring issues. This will be accomplished subsequent to the third objective, which is to both clarify and substantiate the definition of navigation and, more specifically, to consider how anchoring may be associated with such a definition. The final objective is to provide an opinion, based on a review of available precedents, as to whether anchoring regulations should ultimately be upheld as a state matter, or be deemed to be an unconstitutional restriction on public rights or interstate commerce.

The national focus is on HNWPS v. Hawaii, thereby making it the case from which evaluation and judgement applicable to other states shall be derived. Conclusions within the study will be drawn independent of the outcome of the case; a legal question of such magnitude could remain in the courts for years, and it is the researcher's intent to forecast, rather than report on possible outcomes. The study will describe the current state of anchorage laws and the conflicts which have arisen since their establishment. The study shall go on to explain why conflicts exist, and how existing federal legislation has resulted in confusion as to whether anchoring

is a public right or a compensatory privilege. Ultimately, the compilation of data within the research will enable the researcher to accurately judge who should have authority to regulate anchoring: the states, or the federal government.

D. Statement of Hypotheses

In order to support the research, the following hypotheses will be tested:

1. Anchoring can be proven to be an act of navigation.
2. Laws which restrict anchoring, such as those noted in HNWPS v. Hawaii unnecessarily restrict interstate commerce.
3. Laws which restrict anchoring, such as those noted in HNWPS v. Hawaii unnecessarily restrict public rights associated with the public trust doctrine.
4. State-imposed anchorage laws which unnecessarily restrict interstate commerce or public trust rights will be deemed unconstitutional.

D. Anchoring as an Act of Navigation

One of the issues lying at the heart of the anchoring conflict has to do with the definition of 'navigation', and more specifically, the relationship of anchoring to that definition. It has already been established that free navigation is ensured under federal protection. The federal navigation servitude, the offspring of the commerce clause within the United States Constitution,[32] gives paramount right to the federal government to compel the removal of any obstruction to navigation.[33] The navigation servitude is subsequently codified through the Submerged Lands Act of 1953.[34] The Act, though granting jurisdictional use of said lands to the individual states, provides that:

> The United States retains all of its navigation servitude and rights in and powers of regulation and control of said lands for the constitutional purposes of commerce, navigation, national defense and international affairs....[35]

Although it has already been established that navigation is an activity associated with public trust rights, anchoring

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[32] The Constitution of the United States, Article 1, Section 8, Sept. 17, 1787.

[33] Kalo, Coastal and Ocean Law: 147.

[34] Submerged Lands Act of 1953, 43, U.S.C. Sec. 1301 et.seq.

[35] Id. at 1314 (a).

as a right under the public trust doctrine may be substantially reinforced by its association with navigation, a more traditional public trust right. Traditional rights enjoyed by the public in public trust areas are those of "fishing, fowling, navigation and recreation".[36]

Navigation is a federally protected constitutional right. This is affirmed through the navigation servitude, the Submerged Lands Act, and the public trust doctrine. Hence, it would follow that any statute acting as a means of hindering or placing unnecessary burdens on free navigation would be in violation of said provisions. Likewise, if anchoring is an act of navigation, statutes which hinder or place unnecessary burdens on free anchoring would also be in violation of said provisions. It is the purpose of the following section to clarify the legal definition of navigation and resolve the question of whether or not anchoring is an act encompassed within the definition of navigation.

'Navigate' as defined in Webster's New International Dictionary, 2nd. edition, includes the following:

> L. navigatus, past part. of navigare, v.t.&i., fr. navis ship k agers to move, direct...) Intransitive: 1. To journey by water; to go in a vessel; to sail or navigate a vessel; to use the waters as a highway for commerce, or communication; ply...2. Hence, to direct one's course through any medium; to steer, especially to operate an airplane or airship. Transitive: 1. to pass over in

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[36] Amaral and Lee, Public Rights To Coastal Waters: Applying The Public Trust Doctrine, Rhode Island, Coastal Resources Center, 1992: xxi.

> vessels; to sail over or on; as, to navigate the Atlantic;--said also of vessels; by extension, to direct one's course through (any medium). 2. to steer direct or manage in sailing; to conduct; hence to operate, steer, control the course of (an airplane or airship).

It should be duly noted that nowhere in the preceding definition is there any mention of 'anchor' or 'anchoring' as an act of navigation. This is of no consequence, as courts have, in the past, refused to rely on the "definition of such a non-maritime publication" to define the parameters of navigation.[37] Instead, courts have looked towards previous case history and documents to supplement the definition of navigation.

One of the earliest instances in which a court of the United States attempted to define the meaning of 'navigation', and what maritime activities are encompassed within the term, occurred in 1838 with the case of Bowen v. Hope.[38] In this case, the court addressed the question of whether a ship was 'at sea' at the time when her insurance policy had expired. The vessel had been insured for a year, and if 'at sea' when the year expired, then the coverage of her policy was to continue until her return to port.[39] Before the expiration of the year, the vessel had been made ready for sea, and left the port of Bangor, Wales, destined for Boston. After sailing a distance of seven or eight miles, she encountered head winds

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[37] United States v. Monstad, 134 F.2d 986 (1943): 8.

[38] Bowen v. Hope, 37 Mass. 275 (1838).

[39] Id. at 2.

and was unable to get out of the Straits of Menai. There she came to anchor, and although attempting to leave for several days, was unable to do so. When she was finally able to make way, the year's insurance coverage had expired.[40]

Upon arrival in Boston, the insurer made the contention that the vessel had not been covered during the voyage as she had been anchored at the time when her insurance had expired.[41] The court held that even though the vessel had been anchored, she was actively engaged in navigation, and that she was consequently 'at sea' within the meaning of her insurance policy.[42]

The definition of 'navigation' was further expanded in the case of The Idaho, in 1886.[43] At issue here was the transportation of a greater number of passengers by a steamship (the Idaho), than was permissible under the vessel's certificate of inspection. Upon returning to port in Townsend, Washington Territory, the vessel was seized and held liable to fines under United States statutes.[44]

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[40] Id.

[41] Id.

[42] Id. at 3.

[43] The Idaho, 29 F. 187, (1886).

[44] Section 4499 of the United States Revised Statutes reads: "If any vessel, propelled in whole or in part by steam, be navigated without complying with the terms of this title, the owner shall be liable to the United States...in a penalty of $500.00 for each offense....It shall not be lawful to take on board any steamer a greater number of passengers than is stated in the certificate of

In defending their position, the owners of the vessel contended that navigation did not include taking on passengers, and hence, the court had no jurisdiction to enforce the penalty. In responding to this contention, the court stated its opinion as to what was included within the scope of 'navigation':

> The navigation of a vessel, within the purview of this section, includes...everything required and provided therefor and thereabout in this title...such as equipment, management, the character and stowage of cargo, and the number and treatment of passengers thereon.[45]

Thus, early definitions of 'navigation' did not limit it simply to the passage of vessels between ports, but included acts incidental to making a journey. Taking on passengers, stowing their luggage or cargo, managing a vessel, and anchoring where need dictates were all held to be acts of navigation. Subsequently, courts have held that navigation is not limited to the movement of a vessel upon waters, but also includes actions which are necessary to effectuate the passage of vessels upon waters.

In Locke v. State,[46] at issue was the collection of reprisals by the widow of a mariner. The mariner sustained injuries as the result of a negligent state employee, while his boat was in a canal. The state employee had let down a

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inspection..." Id. at 5.

[45] Id at 11.

[46] Locke v. State, 140 N.Y.S. 480, 75 N.E. 1076, (1894).

lift bridge on the mariner's boat, thus causing the injuries.[47] The question was whether the injuries resulted from the 'navigation of the canals', in which case the widow would be granted the reprisal.

Here, the court found that, although the vessel was not moving under its own power at the time of the accident, it was nonetheless engaged in navigating the canals. The court stated that:

> The act of navigating fairly includes the passage of vessels through locks, through canals, or under draw or lift-bridges...if any injury shall occur while passing through a lock, through the neglect of the agent or servant of the state...such injury would in a just sense result from the navigation of the canals. The man who operates the locks and bridges in order to permit the passage of boats upon the canal is engaged in navigating the canal.[48]

Thus, the meaning of 'navigation' was expanded to include not only the movement of a vessel upon waters, but the actions of people not even on the vessel, affecting the vessel's movement and safety.

In Sayer v. State,[49] the court found that a vessel need not be in motion, nor be attended in order to qualify as being 'in navigation'. At issue here was the collision of a state-owned vessel into a privately owned motorboat moored at a slip. The collision resulted in the loss of the motorboat, the

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[47] Id.

[48] Id. at 5.

[49] Sayer v. State, 190 N.Y.S. 359, (1921).

owner of which subsequently filed for relief from the state for damages. As in the previous case, the collision occurred near a system of canals, however here laws did not provide for claims arising out of "navigation of the canals".[50]

In dismissing the case, the court found that although the private vessel had been moored at a slip, it was nonetheless engaged in navigation. The court stated that:

> The fact that the boat was not in motion is not conclusive on the question. It has been held that the word 'navigation' for some purposes includes a period when a ship is not in motion, as for instance when she is at anchor....The motor boat, moored at the terminal, thus was engaged in navigation...although at the moment [of collision] she was not in motion.[51]

Perhaps one of the best incorporations of anchoring within the definition of navigation is derived from United States v. Monstad.[52] Here, a vessel which had been anchored for over two years was held to be 'in navigation'.[53] In this case, action was brought by the United States against Jesse Monstad, the owner of the fishing barge Kohala, to recover a

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[50] Section 47 of the New York State Canal Laws (N.Y.S. Consol. Laws, c. 5) provides that: "any person sustaining damages from the canals or their ose, or from neglect of conduct of any officers having charge of the same, or resulting from any accident connected with the canals, may recover under the conditions herein prescribed, such an amount as will properly compensate him therefor...provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals." Id. at 2-3, quoting New York State Canal Laws.

[51] Id. at 4.

[52] United States v. Monstad, 134 F.2d 986 (1943).

[53] Id.

penalty for having navigated the barge without a certificate of inspection. The Kohala was a barge which had been converted from a self-propelled vessel into a floating platform for use by fishermen. She was anchored by two bow anchors and one stern anchor in the Bay of Santa Monica, California. She had likewise been anchored there for upwards of two years before the government commenced legal action.[54] Monstad, the owner, contended that as the vessel was at anchor, she was not engaged in navigation, and hence did not require a certificate of inspection. A certificate of inspection is ordinarily required of vessels engaged in navigation.[55] The court thought otherwise:

> As so anchored by her commander, she [the Kohala] was enabled to rise and fall on the slack of her anchor chains with the rise and fall of the tide, and also within the slack of the chains to move from right to left through the water with the varying wind and tidal and other currents of the harbor....We do not believe that the word 'navigate' should be confined to the moving of a vessel from one port to another for the purposes of transportation of goods or passengers. This vessel necessarily must have moved from one place to another in the water...that is to say, she necessarily moved her passengers across the ocean currents, and had a movement in them....She is nevertheless engaged in navigation...the word...under statute...including the movements of a vessel within the range of her moorings or anchor chains.[56]

Thus, through Monstad, the legal definition of navigation has been expanded to include vessels lying at anchor. Of no

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[54] Id. at 7.

[55] Id. at 6.

[56] Id. at 8-9.

lesser significance is the fact that the vessel had been anchored for two years without getting under way, and during all of that time she was held to be 'in navigation'.[57] This finding is significant in that it sets precedent for vessels to be able to anchor for at least two years without ceasing to be 'in navigation'.

A final case linking anchoring to navigation is that of Kuramo v. Hamada.[58] At issue here was the contention of a tenant of an exclusive Hawaiian fishery that he had paramount rights over the area in question, the fishery within the water-column, and the underlying lands.[59] This contention arose when the tenant sought to prevent interference with his exclusive fishing rights, from a mariner who was in the practice of anchoring his vessel in the said tidal waters, and selling bait to other fishermen. Although the court recognized the tenant's exclusive rights to the fishery, it held that the Territory of Hawaii owned the submerged lands. As such, it was the Territory's responsibility to ensure public rights over the area. The court recognized navigation as a public right and went on to state that the right of navigation includes, as incident, the right of anchorage.[60]

As it can be seen, case history indicates that the legal

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[57] Id. at 10.

[58] Kuramo v. Hamada, 30 Haw. 841 (1929).

[59] Id.

[60] Id.

definition of navigation is not limited simply to the passage of a vessel over water, as may be suggested in the definitions provided by dictionaries. Navigation does not necessitate that a vessel be under way, manned, or free of her mooring. Vessels engaged in the act of anchoring, or lying at anchor, are engaged in acts of navigation. As navigation is a public right, protected by the Constitution (the commerce clause and navigation servitude), the Submerged Lands Act, and the public trust doctrine, it would logically follow that anchoring is included within the protective powers of these well-established doctrines.

CHAPTER II: COMMON AND CONSTITUTIONAL LAW AFFECTING THE ANCHORING CONFLICT

A. The Public Trust Doctrine

1) History of the Public Trust Doctrine

The public trust doctrine has been called "one of the most controversial developments in modern American law".[61] This may be partially due to the way in which it came to be held as constitutional law. Public interests in navigable waters can be traced back to the Roman institutes of Justinian law, and the Magna Carta.[62] Justinian law dictated that it was an individual's right to "...build a cottage, dry or repair nets, fish, or use the banks of rivers to tie boats to trees, and to place any part of their cargo there, even though the banks of a river are private property..."[63] The recognition of public uses of the sea (and subsequently navigable waters) can also be traced back to both African and

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[61] Charles Wilkinson, "The headwaters of the Public Trust: Some of the Traditional Doctrine", Northwestern School of Law of Lewis and Clark College, Spring, 1989: 1.

[62] Magna Carta reissue, 1225, chapter 23.

[63] Amaral and Lee, Public Rights to Coastal Waters, Rhode Island, Coastal Resources Center, 1992: xvii. "The things which are naturally everybody's are air, flowing water, the sea, and the sea-shore." J. Inst. 2.1.1-2.1.6 at 55 (P. Birks & G McLeod Trans., 1987.

Native American cultures. In Nigeria, for example, the inhabitants have historically enjoyed the right "to fish the sea and enjoy free navigation in tidal and other large inland waterways",[64] while Native American cultures wholly denied the possibility of ownership of land, air and water.[65]

Justinian law played a significant role in shaping the foundation of what was later to become English Common law. English Common law was then to become the most direct source of modern American law, and hence, the public trust doctrine. Typically, the British favored private ownership of land resources, but likewise made an exception for navigable waterways.[66] Common law upheld a distinction between the "jus privatum" (private property), which the King could transfer to individuals, either for money or some other form of compensation, and the "jus publicum" (public property), which was held in trust for the public.[67] The areas which were most important to the public rights were both the coasts, and those stretches of rivers which were affected by the ebb and flow of the tides.

By the time that Sir Matthew Hale produced his landmark

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[64] Wilkinson, "Headwaters of the Public Trust", Northwestern School of Law of Lewis and Clark College, Spring, 1989: 1.

[65] Id.

[66] Id., at 2.

[67] Id.

legal work, De Jure Maris (1670),[68] the legal presumption was that riparian land owners had the exclusive right to use the beds and banks along their adjoining fresh-water rivers. This presumption, however, was subject to a public right to use the beds and banks for purposes incidental to navigation, where the public had acquired that right by prescription or custom.[69] The beds and banks of navigable rivers were in fact used by the public, as a matter of right, for "anchoring, mooring, and towing vessels along the banks, where the public had need for such uses."[70] Subsequently, where there was a conflict with the public right of navigation, the right of navigation prevailed.[71] Thus, the act of anchoring a vessel was upheld as an inalienable public right through the doctrines of English Common law.

English Common law later went on to become the law of the thirteen colonies, and eventually, upon ratification of the Constitution, the law of the thirteen original states.[72] Before the Revolutionary War, by grants from the Crown, the thirteen colonies held title to lands within their borders.

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[68] Sir Matthew Hale, De Jure Maris, 1 Hargrave Tracts, 5-44, London, 1787.

[69] Wilkinson, "Headwaters of the Public Trust", Northwestern School of Law of Lewis and Clark College, Spring, 1989: 3.

[70] Id., at 49.

[71] Id.

[72] Amaral and Lee, Public Rights to Coastal Waters, Rhode Island, Coastal Resources Center, 1990: xviii.

They also had title to areas of coastline and submerged lands.

Subsequent to the formation of the new United States, the colonies (now states) adopted the Constitution, hence forming a single union bound together by a common legislative body. The states, however, withheld both their tidelands and navigable waters from the United States, thereby not ceding these lands to the new Federal government.[73] As a result, authority held by the states over these tidelands and navigable waters (trust lands) is plenary, subject only to the powers surrendered to the Federal government upon ratification of the Constitution. The Constitution subsequently provides that it, all Federal laws and international treaties "shall be the supreme law of the land".[74] Hence, although a state may have title to, and extend authority over a certain area of navigable water and its underlying lands, Federal or constitutional provisions and doctrines affecting the same area are superior to those of the state. Thus, state laws which are in conflict with federal policy are preempted by federal authority.

2) Expansion of the Modern Public Trust Doctrine

Both the existence of the public trust doctrine as a facet of constitutional law, and its significance in enabling

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[73] Id.

[74] Id.

the federal government to use its powers of preemption over state legislative acts, were affirmed in the important case of Illinois Central Railroad Co. v. Illinois (1892).[75]

In 1869 the State of Illinois granted more than 1000 acres of state land to the Illinois Central Railroad Co.. The area granted comprised a substantial portion of Chicago's waterfront on Lake Michigan, a navigable lake. The grant also included submerged lands in Chicago's harbor. The area was described as being:

> ...as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not equal to the pier area along the water front of the city of New York.[76]

Four years after said lands were given to the railroad company, the state, amid cries of corruption, revoked the grant.[77]

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[75] Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). The Illinois Central case is considered to be the cornerstone of legal matters dealing with the public trust doctrine.

[76] Id. at 454.

[77] Although the state maintained that certain limitations had been placed on the railroad company's control of the harbor beds, the railroad company treated the conveyance as an "absolute conveyance to it of title to the submerged lands, giving it, as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters." Id. at 450. See also Wilkinson, "The Headwaters of the Public Trust: Some of the Traditional Doctrine", Spring, 1989: 83.

The Supreme Court recognized that Illinois received title to the harbor upon entering the Union, and ratifying the Constitution. This title, however, implicitly came with a public trust in order to keep the waterways open to the public, for uses such as navigation, commerce, and fishing[78]. Thus, any grant which might deprive the public of these rights would necessarily be revokable. The court went on to state that:

> ...A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation...It is the settled law of this country that the ownership and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.[79]

The major result of Illinois Central is that the court both recognized public trust rights in the affected, submerged lands, and used constitutional powers to ensure that the public would be able to enjoy those rights. The case also helped to define the scope of the public trust doctrine, and

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[78] Id. Navigation, commerce and fishing have been traditional public trust rights throughout the history of the modern American public trust doctrine.

[79] Illinois Central Railroad Co v. Illinois, 146 U.S. 387 (1892), at 453 & 435.

cast it into the existing body of federal case law. Subsequent Supreme Court decisions have recognized that states are granted a wide degree of discretion in administering the trust. None of the ensuing opinions, however, have disturbed Illinois Central's premise that the public trust doctrine applies to all navigable watercourses as a matter of federal law.[80]

At the time during which Illinois Central was decided, the rights of the public in public trust areas were those of fishing, commerce and navigation. Recently, however, the coverage of the public trust has been expanded to include recreation as an additional public right. In Marks v. Whitney,[81] the court found that "trust purposes are far broader than traditional uses of navigation, commerce and fishing, and include uses such as open space and wildlife habitat, use for scientific purposes, hunting, bathing and swimming."[82] Likewise, in Orion Corp. v. Washington,[83] the

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[80] Wilkinson, "The Headwaters of the Public Trust: Some of the Traditional Doctrine", Northwestern School of Law of Lewis and Clark College, Spring, 1989: 14. The standards which were set out in Illinois Central were reaffirmed in cases such as Shively v. Bowlby, 152, U.S. 1 (1894), where the court stated that "[lands under tidewaters] are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people."

[81] Marks v. Whitney, 6 Cal. 3d 251 (1971).

[82] Id. at 259-60.

court stated that public trust rights include "navigation, fishing, swimming, water skiing, and other related recreational purposes."[84] Finally, in Menzer v. Village of Elkhart Lake,[85] the public trust doctrine was expanded exponentially to include "all public uses of water."[86]

The public trust doctrine has also been used as a means by which regulations which place restrictions on the ability of the public to enjoy public trust rights have been invalidated. In Matthews v. Bay Head Improvement Association,[87] the court addressed the question of whether a quasi-public association could exclude, or charge higher fees to non-association members for beach access. The association owns a street-wide strip of land which spans the length of the beach, is located at the foot of seven public streets, and extends down to the mean high water mark. Except for a short period during low tides, beach access necessitates passing over land controlled by the association. The association maintained the beach, and employed life guards along its span during the summer months. Use of the beach was

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[83] Orion Corp v. Washington, 109 Wash. 2d. 621 (1987), Cert. denied; 108 S. Ct. 1996 (1988).

[84] Id. at 640-41.

[85] Menzer v. Village of Elkhart Lake, 51 Wis. 2d (1971).

[86] Id. at 70.

[87] Matthews v. Bay Head Improvement Association, 95 N.J. 306, 471 A.2d 355 (1984).

restricted to members during certain hours of the day, and members who were not residents of Bay Head were charged higher membership fees than residents. Another significant factor in the case is that there are no public beaches in the Borough of Bay Head.

In examining the case, the court held that if the residents of every municipality bordering the New Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. Thus, the Bay Head Policy was found to be contrary to the purpose of the public trust doctrine, and hence not permissible. Likewise, the court held that the association could not charge fees which would distinguish in any way between residents and non-residents.[88]

In a similar New Jersey case, Neptune City v. Borough of Avon by the Sea,[89] the New Jersey Supreme Court prohibited municipalities from charging higher fees to non-residents than to residents for the use of city beaches. Although the plaintiffs did not argue their case as one involving the public trust doctrine, the court supplied the view that the "public trust doctrine dictates that a beach and ocean waters must be open to all on equal terms and without preferance and

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[88] Id.

[89] Neptune City v. Borough of Avon by the Sea, 61 N.J. 296 (1972).

that any contrary state or municipal action is impermissible."[90]

As it can be seen, the public trust doctrine is both powerful and broad-reaching. Navigation and recreation, which are both closely associated with sailing, cruising, and other manifestations of water-bourne activities have been repeatedly upheld as public rights. In the United States, these rights are inalienable, in the same respect as are freedoms of speech, religion and education. To restrict navigation and recreation by the imposition of fees, or the requirement of permits which may potentially be denied, is akin to placing similar restrictions on speech, relegion and education. Likewise, if anchoring is an activity associated with navigation, recreation, or directly linked to the public trust doctrine, laws which impose unnecessary restrictions on anchoring may be contrary to public trust interests and hence unconstitutional.

3) The Public Trust in Hawaii

In assessing the constitutionality of anchoring laws which have been enacted in the State of Hawaii, it is important to take into consideration Hawaii's unique status of being a state which joined the Union only a relatively short while ago. Although currently a state liable to all federal

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[90] Id. at 47.

laws and constitutional provisions, Hawaii still retains some vestiges of legal concepts enacted under its previous monarchy. One example of this is the historical recognition of private rights of ownership over fishponds. Although many Hawaiian fishponds are located in the coastal zone and fit the definition provided by the federal government of "navigable waters", they are recognized as private property.[91] This concept of ownership is akin to that of a farmer over farmland, as both are used as a means of providing food both for the owner and for sale to other members of the community. In this respect, the recognition of private rights over what would normally be considered public resources is in accordance with the public interest.

Through its unique historical background, Hawaii has expanded, in some respects, the uses involved in the public trust. The following legal cases are provided with the intention of clarifying those expansions under Hawaiian law.

The first case which acknowledged the application of public trust rights in Hawaii was that of King v. Oahu Railway & Land Co..[92] The case was similar to Illinois Central in that it involved a railway company attempting to condemn submerged lands and alienate them from the public for railroad purposes. The Hawaiian territorial court, however, declared

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[91] Kaiser-Aetna v. United States, 444 U.S. 164 (1979).

[92] King v. Oahu Railway and Land Co., 11 Haw. 717 (1899).

that the lands under the navigable waters in and around the territory of Hawaii were held in trust for public uses. The court went on to recognize that these public trust uses included "navigation, sailing and anchorage of vessels."[93]

The unique legal status of Hawaiian fishponds is illustrated in Kaiser-Aetna v. United States.[94] The issue in this case took into consideration the legal status of a private Hawaiian fishpond which was transformed into a marina servicing an exclusive commercial and residential development. Before the development of the Hawaii-Kai Marina, Kuapa Pond was a shallow lagoon, separated from Maunalua Bay and the Pacific Ocean by a barrier beach.[95] It was subject to the ebb and flow of Pacific tides, and was navigated by shallow-draft fishing vessels for private fishing purposes. Upon creating the marina, the owners dredged the lagoon, and made openings in the barrier beach to allow the passage of larger vessels.[96] Upon opening the lagoon to accommodate the passage of vessels other than the original fishing vessels, the United States, through the Army Corps of Engineers made the contentions that (A) since the lagoon now fit the federal definition of a navigable waterway, the marina was subject to

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[93] Althaus, Public Trust Rights, Oregon, U.S. Dept. of the Interior, 1978: 327.

[94] Kaiser-Aetna v. United States, 444 US 164 (1979).

[95] Kalo, Coastal and Ocean Law, 1990: 152.

[96] Id. at 153, 154.

Army Corps regulation under Section 10 of the Rivers and Harbors Act,[97] and,(B) as a navigable waterway, the public was free to navigate the waters of the lagoon without being subject to fees.[98] The court recognized the unique status of Hawaiian fishponds, and in deciding the case, held that although Army Corps jurisdiction could be extended over the lagoon, the owners still retained a private interest in the development, and could therefore continue to charge boating and mooring fees.[99]

Even with Hawaii's recognition of the special status of fishponds, it should also be noted that in some cases, where a tenant's exclusive rights over a fishery have been upheld, the courts have limited that right strictly to the fishery, and not to the geographical area in which the fishing is being conducted. One such example of this concept is illustrated in Kuramo v. Hamada.[100]

In this case, the tenant of an exclusive fishery sought to prevent interference with his exclusive fishing rights from a boatman who would anchor his vessel in the tidal waters and sell bait to others. The court held that although the tenant had established exclusive fishing rights, these rights were

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[97] Althaus, Public Trust Rights, Oregon, U.S. Dept of The Interior, 1978: 329.

[98] Id.

[99] Id.

[100] Kuramo v. Hamada, 30 Haw. 841 (1929).

limited to the fishery. There was no evidence that the tenant had established private rights to the lands underlying the tidal waters, hence it was presumed that the Territory owned the land in question and all the rights incidental thereto.[101] The court then went on to establish that when rights of fishery and navigation come into conflict, the right of navigation is paramount.[102] This conclusion echoes the vestiges of English Common law. Finally, the court held that the right of navigation included the right of anchorage, and denied the requested injunction.[103]

As it can be seen, Hawaii is somewhat unique in that it recognizes, in certain instances, a private interest in what might elsewhere be held to be public domain. This is important with regard to anchorage laws, in that in some very specific circumstances, the collection of fees from anchored and moored vessels may be a permissible activity. Evidence indicates, that this may only be done by private parties, within the limits of what has been legally recognized to be their private lands. Evidence, however, does not justify the imposition of restrictions or fees on anchored vessels in state-owned lands (lands subject to the public trust). On the contrary, Hawaiian case law has shown navigation, and more specifically

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[101] Id.

[102] Id.

[103] Id. See also Althaus, Public Trust Rights, Oregon, U.S. Dept of THe Interior, 1978, at 328.

anchoring, to be activities consistent with the public's use of state-owned lands (public trust rights).

The conclusion to be drawn from this data is that laws which may potentially serve to deny, restrict, or place incidental burdens upon navigation or anchoring are contrary to public trust interests. Therefore, through the application of the public trust doctrine, such laws may be found to be unconstitutional.

B. The Federal Navigation Servitude

During the years which followed independence from Britain, the early settlers established paths of both exploration and trade along the watercourses of the newly formed nation. These watercourses functioned as transportation routes, and their shores became the logical areas for settlement.[104] Recognition of the importance of an unimpeded system of transportation (and navigation) can be seen as far back as the era of George Washington. While traveling through the nation's interior, Washington said:

> ...I could not help taking a more extensive view of the vast inland navigation of these United States and could not but be struck by the immense extent and importance of it, and of the goodness of that providence which has dealt its favors to us with so profuse a hand. Would to God we may have the wisdom to improve them.[105]

Washington's sentiment was echoed in Article IV of the Northwest Ordinance of 1787.[106] The Ordinance provides that:

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[104] S. Dunbar, A History of Travel in America, New York, Dodd, Mead & Co., 1915: 16-17.

[105] Wilkinson, "The Headwaters of the Public Trust: Some of the Traditional Doctrine", Northwestern School of Law of Lewis and Clark College, Spring, 1989: 55, quoting George Washington.

[106] Northwest Ordinance, Ch. 8, 1., Stat. 50, 52 (1789).

> The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, import, or duty therefor.[107]

Thus, congressional recognition of the importance of free navigation was codified into law, thereby reinforcing the concept of navigation as a public right.

The federal navigation servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution to compel the removal of any obstructions to navigation without necessarily having to pay "just compensation" which is ordinarily required by the Fifth Amendment.[108] Although similar in spirit, the public trust doctrine and the navigation servitude are separate and distinct doctrines. The public trust doctrine is developed from the common law, and generally applies to the states. The federal navigation servitude, however, accomplishes at the federal level some of the same things which the public trust doctrine accomplishes at the state level. One of the oldest uses of the public trust doctrine is the preservation of navigation. The federal navigation servitude is designed to preserve navigation, hence the two distinct doctrines can

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[107] Id. at 52.

[108] Kalo, Coastal and Ocean Law, 1990: 147.

accomplish the same purpose on two different levels.[109]

The navigation servitude is derived from the commerce clause, which is the third clause of Article 1, Section 8 of the United States Constitution.[110] This section provides that:

> The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes...and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or offices thereof.[111]

For many years after the enactment of the Constitution, Congress did little or nothing to establish a federal navigation servitude.[112] This was to change in 1824, in the Supreme Court case of Gibbons v. Ogden,[113] which may very well be considered the cornerstone of the navigation servitude. The case arose when the defendant, Gibbons, a steamboat owner, challenged the constitutionality of a New

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[109] Althaus, Public Trust Rights, Oregon, U.S. Dept of The Interior, 1978: 140. At the state level, the public trust doctrine and the navigation servitude are often discussed together. This is understandable in view of the similar results which they can accomplish.

[110] The Constitution of the United States, Article 1, Section 8, Sept. 17, 1787.

[111] Id.

[112] Sweat, "Water Related Property", Practicing Law Inst, 1990: 8.

[113] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 23 (1824).

York statute, which gave Robert Fulton the exclusive right of navigation of the waters of the state by steamboat. The United States Supreme Court held that the New York legislation was repugnant to the Constitution and especially to the commerce clause, and therefore void.[114] In deciding the case, Chief Justice Marshall defined the meaning of commerce within the commerce clause as comprehending navigation:

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter...The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes'.[115]

Like the public trust doctrine, the scope of the navigation servitude has expanded over time. One of the

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[114] Id.

[115] Id. at 188, 190.

earliest cases to both incorporate the navigation servitude, and expand its scope to include submerged lands was that of Gibson v. United States.[116] The case was brought to recover damages resulting from the construction of a dike by the United States Government. In assessing the case, the court stated that:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under it, it is always subject to the [navigation] servitude in respect of navigation created in favor of the federal government by the Constitution.[117]

In recent years, the scope of the navigation servitude has gone beyond its original spirit of dealing strictly with trade-related commerce. It has been expanded to include recreational boats of all sizes.[118] One authority describes this expansion in the following terms:

> All state-created rights in navigable waters are subject to the exercise of paramount constitutional powers by the United States in areas of national concern which require uniform regulation. Perhaps the most extensive of these powers is the power to regulate foreign and interstate commerce...Here, the concern is with the extent and scope

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[116] Gibson v. United States, 166 U.S. 1000 (1897).

[117] Id. at 271, 272.

[118] Dennis Nixon, "Evolution of Public and Private Rights to Rhode Island's Shore", Suffolk Univ. Law Rev., Summer 1990: 3.

> of the limitations, under the commerce clause, that are placed on public and private rights established under state law. Of course, any state law or property rule, inconsistent with the federal exercise of power described here, cannot withstand a challenge which raises the federal question. On the other hand, the public is relatively free to exercise recreational uses of navigable waters under federal control when these uses are consistent with the paramount federal program or national interest.[119]

Although the navigation servitude does not specifically grant that the federal government has the power to supercede state authority with regard to the establishment of laws which regulate anchoring, such power may be distilled from the definition of navigation, and more specifically, the association of anchoring with such a definition. If anchoring is an attribute of navigation, then laws which regulate anchoring may be subject to federal preemption through the navigation servitude, established in both the Constitution and the Submerged Lands Act. This association, of course, is dependant upon the definition of navigation.

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[119] Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters", Land and Water Law Rev., 1978: 391, 425, 426.

C. The State Police Power

The state police power, like the public trust doctrine, operates in favor of the protection of public rights. The police power is hence an inherent attribute of sovereignty.[120] A state's extension of police power has been recognized as providing the justification behind which some laws which may affect navigation have been enacted.[121] The United States Supreme Court, in an 1847 case upholding the constitutionality of licensing statutes, defined police power:[122]

> [The police powers of a state]...are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenders, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its domain. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the

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120 Althaus, Public Trust Rights, Oregon, U.S. Dept. of The Interior, 1978: 81.

121 Beveridge v. Lewis, 939 F.2d 859 (1991).

122 Id. at 82. See also License Cases, 46 U.S. 504 (1847). These consolidated cases involved various state statutes which regulated, licensed or prohibited the sale of alcoholic beverages. It was claimed that these statutes were unconstitutional or in violation of the federal power to regulate interstate commerce.

Constitution of the United States. (Emphasis added).[123]

The police power is derived from the Tenth Amendment to the United States Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[124] Accordingly, the leading police power cases in the United States Supreme Court involve appeals from state supreme court decisions, in which state legislation was attacked as being unconstitutional.[125] Although police power cases usually involve state police powers, the Supreme Court has also both referred to and reaffirmed an analogous implied federal power over federal property.[126] Likewise, it has been held that federal exertion of the power to regulate commerce under the

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[123] License Cases, 46 U.S. 504 (1847) at 53.

[124] The Constitution of The United States, Amendment X, 1791.

[125] Althaus, Public Trust Rights, Oregon, U.S. Dept. of The Interior, 1978: 82. Usually, the United States constitutional provisions involved are fifth and fourteenth amendments, prohibiting the taking of private property without just compensation. The issue is also of importance in anchoring laws because of the very nature of claims of unconstitutionality thereof.

[126] Id. at 83. See also Camfield v. United States, 167 U.S. 122 (1887) at 525.: "...and even over public land within the states, the general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."

commerce clause is attended by the same incidents which attend the exercise of the police powers of the state.[127] Generally, police powers are employed when such regulation becomes necessary to preserve the public good.

Like the public trust doctrine, the roots of state and federal police powers may be found in English Common law. Several examples of valid regulation for the common good can be seen in the following excerpt from Sir Matthew Hale's De Portibus Maris:

> A man for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage, for he doth no more than is lawful for any man to do, viz.: makes the most of his own. If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port as it may fall out where a port is newly erected: in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc. neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf and crane and other conveniences are effected with a public interest and they cease to be juris privati only; as if a man set out a street in a new building on his own land, it is now no longer bare private interest, but is affected by a public interest.[128]

Despite having similar bases in common law principles, there is a significant difference between the police power and

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[127] Id.

[128] Id. at 85, quoting Sir Matthew Hale.

the public trust doctrine. In essence, the public trust doctrine prescribes a series of public rights, while the police power may be used as a means of ensuring those rights. With regard to the ownership of submerged lands, public trust property is subject to an ownership interest retained by the state on behalf of the public and is applicable only to those public areas. The police power, however, reaches all property, private and public, but as to private property, the public interest is not an ownership interest, and the power to regulate is accordingly limited.[129]

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[129] Id at 86.

CHAPTER III: STATUTORY ISSUES AFFECTING THE ANCHORING CONFLICT

A. The Submerged Lands Act of 1953

1) History of the Submerged Lands Act

Up until the middle half of the twentieth century, there was little if any question as to who held title to a state's submerged lands. The original thirteen states viewed themselves as having both jurisdiction over and ownership of the resources of this area. Likewise, the states recognized that such jurisdiction and ownership was subject only to the overriding constitutional powers of the federal government to regulate matters of navigation, commerce and foreign affairs.[130] Under the equal footing doctrine, states which were subsequently admitted to the Union adopted similar assumptions, and enjoyed the right to extend authority over their submerged lands, again being only subject to constitutional provisions.

Although not the first time the issue was examined,[131] the idea of state ownership of submerged lands was

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[130] Kalo, Coastal and Ocean Law, 1990: 407.

[131] Martin v. Waddell similarly examined the question in 1842.

substantially affirmed through the 1845 Supreme Court decision in Pollard v. Hagan.[132]. The case concerned a dispute over the ownership of a lot on Mobile Bay, in Mobile, Alabama. The sole question was whether Congress had the power to grant to private ownership lands which had been below navigable waters at the time that Alabama had been admitted into the Union, but had become fast land by the receding of the high water mark in subsequent years[133]. The court found that whether the water had receded by natural causes or by human intervention, Congress did not have the authority to grant title, as ownership was in the state. The court stated that:

> Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution of the United States; and no compact between her and the United States could diminish or enlarge these rights.[134]

The idea of state ownership and jurisdiction over submerged lands was held to be almost sacrosanct for over one hundred years, until a chain of events beginning in the early twentieth century shattered that trend. The issue did not become important until oil and gas were discovered offshore in

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[132] Pollard v. Hagan, 44 U.S. 212, (1845).

[133] Id.

[134] Id. at 573. The court also considered the power of the United States to convey public lands and held that the power of Congress over the public lands (or public domain) conferred no power to grant the shores of navigable waters and the soils under them which were not granted by the Constitution to the United States, but were reserved to the States respectively.

both the Pacific Ocean and the Gulf of Mexico.[135] As early as 1921, the California legislature began to enact legislation authorizing leases within three English (land) miles of the California coast.[136] This practice was initially accepted by the federal government until 1945.[137]

In 1945, the federal government sought a decree declaring federal ownership of lands off the shore of California, underlying the Pacific Ocean, out to the extent of the "three-mile belt".[138] The federal government brought suit against the State of California, alleging that the United States was the owner of the lands in question.[139] California contended that the three-mile belt was a part of the land underlying the navigable waters which passed to the state on attaining statehood.

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[135] Ray Sweat, "Water Related Property, Creditors' Rights and Forfeiture of Title", Practicing Law Inst., Dec., 1990: 31.

[136] Id. The inland waters, bays, gulfs and estuaries, and water extending seaward three nautical miles (3.45 English, or land miles), from the low water mark are known as the territorial waters within the jurisdiction and sovereignty of the coastal state or country. The three nautical miles, or one marine league, was thought to be the extent of the effective range of land-based weapons near the end of the eighteenth century. Areas beyond this distance were thought to be the high seas, common to all nations. Id. at 5.

[137] Kalo: Coastal and Ocean Law,: 407.

[138] Helen Althaus, Public Trust Rights, Oregon, U.S. Dept. of The Interior, 1978: 201.

[139] Sweat, "Water Related Property", Practicing Law Inst., 1990: 30.

In evaluating the case, the Supreme Court held that the three-mile belt was owned by the United States, and not solely by California. The court pointed out that historically the three-mile belt was a concept which came after the revolutionary war, and that it was the federal government that subsequently gained dominion over it.[140] The precedent which was thought to have been established since Pollard v. Hagan was dismissed when the court emphasized that the nation's international responsibilities may have been involved:

> What this government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations...the very oil about which the state and nation here contend might well become the subject of international dispute and settlement...The ocean, even its three-mile belt, is thus of valid consequence to the nation in its desire to engage in commerce and to live in peace with the world...Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area.[141]

Accordingly, the court ruled that federal rights are paramount in the three-mile belt.

Following the California decision, the Attorney General of the United States immediately filed similar cases against

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[140] Althaus, Public Trust Rights, Oregon, U.S. Dept of The Interior, 1978: 202.

[141] United States v. California, 332 U.S. 19 (1947), at 35, 36, 91.

Louisiana and Texas, the two other big oil producing states. By 1950, the Supreme Court had announced similar decisions in favor of the United States.[142]

The decisions in these cases caused quite a bit of controversy, which was soon felt by Congress. Likewise, their outcome brought drilling for oil and gas almost to a complete standstill. The first congressional action in response to the deleterious situation was to create Senate Joint Resolution Twenty, which would have quitclaimed all federal interests in the submerged lands to the coastal states, and restored ownership of the submerged lands within the three-mile limit to the respective states[143]. Congress sent the resolution to then President Truman in 1952, but the President, being a firm proponent of federal ownership of offshore resources, vetoed the bill.[144] Subsequently, numerous bills which were similar in character were also introduced by Congress, but alas were consistently opposed as "giveaway legislation".[145] The controversy came to be known as the "tidelands issue", and was a major factor during the 1952

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[142] Althaus, Public Trust Rights, Oregon, U.S. Dept. of The Interior, 1978: 204. See also United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950).

[143] Kalo, Coastal and Ocean Law, 1990: 412.

[144] Id.

[145] Id.

Presidential elections.[146]

Truman's efforts to preserve federal ownership of submerged lands were quickly reversed upon General Eisenhower's election to the Presidency. On May 22, 1953, Eisenhower signed the Submerged Lands Act into law.[147] By this statute, the United States relinquished and assigned title and ownership of the disputed submerged lands to the respective coastal states.[148]

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[146] Ernest Bartley, The Tidelands Oil Controversy, Austin, University of Texas Press, 1953: 3-5.

[147] Id.

[148] Althaus, Public Trust Rights, Oregon, U.S. Dept. of The Interior, 1978: 204.

2) Selected Provisions of the Submerged Lands Act

The Submerged Lands Act established the ownership by the states of the lands periodically or permanently covered by tidal waters up to, but not beyond, the mean high tide line, extending seaward to an arbitrary line three geographical miles from the mean low tide line.[149] The Act further provided that, as to the states bordering the Gulf of Mexico, ownership would extend seaward up to three marine leagues from the coastline, if their original boundaries had extended that distance.[150]

The Act also served as a means of conferring the "natural resources" within the three-mile band to the respective coastal state. A very specific definition of the constitution of "natural resources" was provided in the Act:

> The term 'natural resources' includes, without limiting the generality thereof, oil, gas and other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the

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[149] Sweat, "Water Related Property", Practicing Law Inst., 1990: 33.

[150] Id. In United States v. Alabama, Florida, Mississippi, and Texas, 364 U.S. 502 (1960) and United States v. Louisiana, 382 U.S. 285 (1965), the United States Supreme Court confirmed title in Alabama, Louisiana, and Mississippi three geographical miles seaward from their coastlines and in Florida and Texas, three leagues seaward from their respective coasts. This fixed the title to all the lands, minerals and other natural resources underlying the Gulf of Mexico to the lines previously described.

production of power.[151]

By virtue of the Submerged Lands Act and the subsequent sovereignty imparted on the states over the resources lying within the three mile territorial sea, states are allowed to enact laws which affect these resources. Hence, as an anchor dropped overboard from a vessel navigating in a state's waters comes to rest on the submerged land under the vessel, the anchor lies on state-owned land. If done in a careless manner, such an anchor could be very hazardous to a coral resource. In this respect, the Act may be interpreted as providing the justification by which states have enacted laws to regulate anchoring. The question of anchoring as an act of navigation, however, becomes a point of interest at this juncture, as its regulation may be preempted by the federal government through the implications of Section 1314, (a), of the Act:

> The United States retains all its navigational servitude and rights in and power of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include proprietary rights of ownership or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established and vested in and assigned to the respective states and others by section 1311 of this title.[152]

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[151] Submerged Lands Act of 1953, 43 U.S.C., Section 1301 (e).

[152] Id. Section 1314 (a).

Thus, although a state may be justified in regulating or collecting revenues from the use of its submerged lands, the applicability of state laws which purport to do so is limited by the powers retained by the federal government through the navigation servitude.

B. Federal Regulatory Authority: Coast Guard versus Army Corps

One of the questions which has been raised with regard to the anchoring conflict is exactly which federal agency has been entrusted with the duty to oversee matters of navigation, and more specificly matters of anchoring? The choice lies between the Coast Guard (the regulatory arm of the Department of Transportation), and the Army Corps of Engineers (the regulatory arm of the Department of Defense). While the Army Corps of Engineers (Army Corps) does oversee matters concerning the maintenance of unobstructed navigation, the Coast Guard is likewise employed in similar duties. In light of the matters discussed in this project, it is more appropriate to consider the Coast Guard as the primary federal regulatory authority. It is likewise important to consider the extent of authority held by the Army Corps.

1) The Rivers and Harbors Act of 1899

The authority of the Army Corps as the federal body responsible for ensuring free navigation began with the Rivers and Harbors Act of 1899.[153] The Act gave the Corps regulatory control over the navigable waters of the United States, and the power to enforce the laws of the federal

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[153] Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 401 et. seq.

government in such waters. The Army Corps' regulatory authority over navigation and commerce was derived indirectly from the United States Constitution.[154] In general, the Army Corps' regulatory activities primarily consisted of reviewing proposed projects, and issuing and enforcing permits for activities undertaken in navigable waters of the United States.[155] That these responsibilities were intended to prevent obstructions to navigation is evident in the provisions of the Act:

> The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited;...it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port...harbor...or other water of the United States, except on plans recommended by the Chief of Engineers, and authorized by the Secretary of the Army....[156]

It should be noted that the 'obstructions to navigation' indicated in the provisions of the Act primarily refer to physical obstructions to navigation. Wharfs, piers, and

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[154] The power to regulate matters of commerce and navigation is derived from Congressional power under the United States Constitution, Art.1, Sec.8, "the commerce clause". Although control over navigable waters is not specificly granted to the government in the Constitution, the Supreme Court held in Gibbons v Ogden, 22 U.S. 1 (1824), that the power to regulate commerce includes the power to regulate navigation, hence navigable waters.

[155] Kalo, Coastal and Ocean Law, 1990: 171.

[156] 33 U.S.C. Sec. 403. Obstruction of navigable waters.

breakwaters are all items which may pose a physical hazard to navigation, thus affecting the navigable capacity of any particular body of water. Research has not indicated the existence of any 'anchorage laws' which may have been considered to pose an obstruction to navigation at the time when the Act was passed. Likewise, the legislative history of the Rivers and Harbors Act does not indicate that it was to be used to regulate the anchoring of vessels. Army Corps jurisdiction over acts of navigation, such as anchoring, may have been implied in the early part of this century simply because of the fact that no other federal regulatory body with powers over navigable waters existed at that time.

The United States Coast Guard did not come into existence until the early part of 1915, when it was officially established through the Department of Transportation Act.[157] This Act served to combine the existing United States revenue cutter, and life-saving services into one consolidated group, presided over by the Department of Transportation. Later, the Lighthouse Service of the Department of Commerce was to be incorporated into this group as well.[158]

The Department of Transportation Act served to transfer all functions, powers and duties of the Secretary of the Army

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[157] Department of Transportation Act, 80 Stat. 931., January, 1915.

[158] Presidential Reorganization Plan No. 2, July 1, 1939.

under specified laws, to the Secretary of Transportation.[159] These laws specifically applied to navigation and anchorage areas.[160] The Secretary of Transportation, in turn, delegated to the Commandant of the Coast Guard the authority to exercise the powers of the Secretary with respect to anchorages and navigation.[161]

Section 7 of the River and Harbor Act of March 4, 1915,[162] empowers the Coast Guard with the authority to establish anchorage grounds for vessels in the navigable waters of the United States "whenever it is apparent that [anchorage grounds] are required by the maritime or commercial interests of the United States for safe navigation."[163] The provisions of the Act go on to establish that:

> District Commanders will, whenever matters relating to the anchorage of vessels are under consideration, ascertain the view of the District and Division Engineer, Corps of Engineers, U.S. Army, and the proper representatives of other departments likely to be interested....[164]

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[159] Id. at 6(g).

[160] Coast Guard Regulations, 33 C.F.R., Sec. 109.01 (1989).

[161] Department of Transportation Order 1100.1 See also 49 C.F.R. 1.4 (a) (3).

[162] River and Harbor Act of March 4, 1915, 33 U.S.C. 471.

[163] Coast Guard Regulations, 33 C.F.R. Sec. 109.05.

[164] Id. at 109.05 (b).

This provision is important in that it places the authority of the Coast Guard and Army Corps into perspective. While it is primarily the duty of the Coast Guard to oversee matters concerning the anchorage of vessels, this duty does not preclude the Army Corps from supplying their own input, hence a degree of authority, into the matter. It is, however, primarily the Coast Guard that extends prevailing power over the matter.

That it is Coast Guard, rather than Army Corps authority that is primarily extended over such matters of navigation as anchoring, is further expressed in the provisions of the Ports and Waterways Safety Act:[165]

> The United States Coast Guard [is authorized] to specify times of movement within ports and harbors, restrict vessel operations in hazardous areas and under hazardous conditions, and direct the anchoring of vessels.[166]

Here, it is specifically stated that it is the duty of the Coast Guard to "direct the anchoring of vessels". This should leave no doubt that, while both the Army Corps and the Coast Guard share a concurrent authority over matters concerning navigation, this authority is divided in respect to the different facets of navigation. While the Army Corps is involved in the permit process, and seems to be more concerned

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[165] Ports and Waterways Safety Act, 49 C.F.R. 1.46 (n).

[166] Coast Guard Regulations, 33 C.F.R. Sec. 109.07, citing Ports and Waterways Safety Act.

with physical obstacles to free navigation, the Coast Guard seems to be more involved with the actual passage of vessels, their safety, and related regulations of navigation. Hence, for the purposes of this research, it is the Coast Guard which should be considered the primary federal regulatory authority.

2) Executive Order #12612 on 'Federalism'

The actual effect of federal authority in resolving the anchoring conflict is questionable. This is due to the restrictions placed on the preemptive powers of all federal agencies through Executive Order 12612, of October 26, 1987.[167] This order mandates that all federal agencies are to avoid using their preemptive power over state and local government action. Under this Order, federal agencies may only preempt where a federal statute contains an express preemption provision, or where it can be clearly proven that Congress had intended to so preempt.[168] As neither courts nor legislators have officially associated a federal preemptive intent with laws which regulate anchoring, federal agencies have no cause to use their preemptive powers over state anchoring laws.

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[167] Executive Order 12612, "Federalism", Oct. 26, 1987.

[168] Id.

C. The Coast Guard Legal Opinion

On January 19th, 1993, the Chief of the Coast Guard's Maritime and International Law Division released a memorandum which defined the Coast Guard's position towards anchorage policy.[169] The memorandum described the results of an eleven month legal review of the anchoring conflict. The legal review came as a result of a request from the Boat Owners Association of the United States (BOAT/US).[170]

The results of the Coast Guard's legal investigation were mixed; siding on the behalf of the states on some points, while also recognizing the constitutional right of the public to enjoy free navigation. Ultimately, although willing to provide a legal opinion on the matter, the Coast Guard has refused to monitor the constitutionality of state laws, or take any type of legal action against states.

In undertaking the legal study, the Law Division of the Coast Guard was asked to assess questions from three broad areas. The areas under question were: (1) to define the limits on state regulation of anchoring in the navigable waters of the United States; (2) to assess whether state regulation of

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[169] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992: 1.

[170] Flannery, "Decision disappoints anchorage rights groups", Soundings, March, 1993: A4. BOAT/US is one of the lobbying groups involved in the anchoring conflict.

navigation unduly interferes with the public right to navigate, and; (3) exactly when may the Coast Guard act to ensure freedom of navigation in the navigable waters of the United States.[171] These broad question areas were subsequently broken down into five specific questions, which were answered in the memorandum. The five specific questions appeared as follows:

> 1. What are the limits on state regulation over anchoring?[172]
>
> 2. Are the states preempted from regulating anchoring on the navigable waters of the United States?[173]
>
> 3. Is state regulation of navigation and anchoring limited by the application of the 'dormant' commerce clause of the United States Constitution?[174]
>
> 4. Can state regulation of anchoring and navigation constitute an undue restriction of a boater's right of free navigation?[175]
>
> 5. Assuming that a state scheme of regulation over navigable waters of the United States has either run afoul of a conflicting federal statute or improperly interferes with interstate commerce, what is the obligation of the Coast Guard, representing the federal

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[171] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992: 1. The original "call of the question" was much more broad, and the question areas represent a revised list of the material originally requested by BOAT/US. The Coast Guard worked only with the revised list.

[172] Id.

[173] Id. at 2.

[174] Id. at 5.

[175] Id. at 6.

government, to resolve the conflict?[176]

In addressing the first question, the Coast Guard concluded that the states enjoy a concurrent authority with the federal government over navigable waters of the United States, within their respective borders. This concurrent authority comes as a result of a state's inherent police powers "to prescribe, within limits of the state and federal constitutions, reasonable regulations necessary to preserve the public order, health, safety and morals."[177]

The exercise of state police power is limited in two ways. First, if Congress enacts a federal statute that conflicts with state law, federal law preempts the conflicting state law. Second, that the exercise of state regulatory authority is directly limited by powers reserved to the federal government because of the "exclusive nature of congressional authority to regulate interstate commerce."[178] This Congressional authority has sometimes been referred to as a "dominant servitude" or a "superior navigation easement".[179] Within this study, it is referred to as the "navigation servitude". The navigation servitude

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[176] Id. at 7.

[177] Id. at 1. See also 16A Am. Jur. 2d., "Constitutional Law", (1979): 366.

[178] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1993: 2.

[179] Id.

enables federal authority to supersede state regulations where such regulations might unduly burden interstate commerce, and is applicable even where Congress fails to act.[180] The Coast Guard authorities found that the states may regulate anchoring in their respective waters as a legitimate exercise of their police powers, provided that such regulations do not go beyond either limitation on state power.[181]

The second question taken into account in the Coast Guard's legal study deals with the issue of whether the states are preempted from regulating anchoring on the navigable waters of the United States. In addressing this issue, the Coast Guard pointed out that the Supreme Court has traditionally fashioned a two-tier analysis thereof. First, state law is preempted if Congress either explicitly or implicitly evidences an intent to exclusively occupy a given field.[182] Second, even if Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent that it actually conflicts with federal law. In other words, when it is impossible to accommodate both state and federal law, or where a state law may stand as an obstacle "to the accomplishment of

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[180] Id.

[181] Id.

[182] Id. In undertaking this analysis, it must also be assumed that the historic police powers of the states were not to be superseded by the Federal Act, unless that was the clear intent of Congress. (Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947)).

the full purposes and objectives of Congress", state law is preempted by federal authority.[183] These preemptive stipulations are further restricted by Executive Order 12612 of October 26, 1987, which suggests that preemption of state law is to be applied judiciously in dealing with the states, and that federal agencies are to avoid direct, overbearing confrontation.[184]

The Coast Guard found that Congress has not demonstrated an express or implied intent to preempt state regulation of anchorages.[185] Congress has, however, established an extensive scheme of federal regulations over navigation and navigable waterways. In general, courts which have considered the matter (of anchorages) have generally concluded that Congress has not pervaded the field, leaving quite a few areas open to state regulation.[186] In fact, Congress has not only

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[183] Id. at 3. Also see Pacific Gas and Electric Co. v. State Energy Commission, 461 U.S. 191, 103 S.Ct. 1713, (1983).

[184] Executive Order #12612, "Federalism", October 26, 1987 sets forth guidelines regarding the relationship between federal agencies and the states. Although it suggests that federal preemption is to be avoided or handled judiciously, preemption is not prohibited where state action clearly conflicts with agency policy and actions. Id.

[185] In the context of this point, it must be noted that there is a clear distinction between "anchorages", which is the subject of discussion in the immediate context, and "anchoring", which may or may not be an act of navigation.

[186] In Beveridge v. Lewis, 939 F.2d 859 (1991), the U.S. Court of Appeals for the Ninth Circuit found that a city ordinance enacted by the city of Santa Barbara, affecting vessel moorings was not preempted. The ordinance required vessels to obtain permission to moor or anchor in a

failed to pervade the field, but on the contrary has expressly encouraged the individual states to take a more active role through the Coastal Zone Management Act of 1972 (CZMA).[187] In particular, Congress found that it was the national policy to "encourage the states to balance competing interests among industry, national defense, recreation, fisheries, and energy".[188]

In analyzing the question of whether a state law conflicts with federal statutes, the Coast Guard points out that some observers have cited 33 U.S.C. 471 and 33 C.F.R. Part 109 as providing the basis for federal preemption of state regulation of anchorage.[189] The statute, 33 U.S.C. 471, gives the Coast Guard the authority to establish anchorage grounds in the navigable waters of the United States

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designated area, and forbade anchorage in another. The court held that although federal law regulates much of the activity on or near navigable waterways, it does not entirely exclude state or local governments from supplementing federal regulations. In reaching its decision, the court looked at specific regulations cited by the plaintiffs. These regulations were the Ports and Waterways Safety Act, s 4, as amended (33 U.S.C.A. s 1223); 33 C.F.R. 165, on special anchorage area regulations; and 33 C.F.R. 110, on security zone regulations. The plaintiffs failed to make any reference to the commerce clause, navigation servitude, or historical public trust rights, which, if employed may have had a significant bearing on the court's decision.

[187] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992: 4. Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq.

[188] Id. See also 16 U.S.C. at 1452 (b).

[189] Id. at 5.

whenever such anchorage grounds are in the best maritime or commercial interests of the nation to carry out safe navigation.[190] In practice, however, the regulations promulgated under this authority do not establish a pervasive system of federal regulation over anchorage. Likewise, federal law enables the Coast Guard to establish "special anchorage areas", where vessels of less than 65 feet in length may anchor and are not required to display anchor lights and shapes, which are ordinarily required.[191] As long as a state does not purport to regulate the display of lights and shapes within one of those such "special anchorage areas", it may enact anchorage regulations without subjecting itself to federal preemption.

The third question addressed by the Coast Guard in their legal study deals with state regulation of navigation and anchoring being possibly limited by the application of the commerce clause of the Constitution. In addressing this question, the Coast Guard first established that Supreme Court findings suggest that the federal government has the exclusive right to regulate navigation, however the Court also recognizes that the states have a wide scope for regulating matters of local nature which may affect interstate

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[190] Id.

[191] Id.

commerce.[192]

The Coast Guard's review of court interpretations of the commerce clause and navigational rights revealed mixed results. While some court findings hold that the commerce clause is inapplicable to recreational boating, others concede that laws which prohibit temporary mooring or anchoring of a vessel within township waters are in conflict with the commerce clause, and thus inapplicable.[193] In summing up this issue, the Coast Guard noted that the Supreme court has invalidated state laws under the commerce clause only when they fall into three general categories: (A) laws that

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[192] In Gibbons v. Ogden, 22 U.S. (9wheat) 1 (1824), the Supreme court suggested that the federal government had the exclusive right to regulate navigation. In Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), the Supreme Court recognized that states may not regulate subjects which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority. The Court went on to conclude that state regulation affecting interstate commerce would be upheld if the regulatory burden imposed on interstate commerce was outweighed by the state interest in enforcing the regulation. This finding may serve to grant the states considerable authority under their police powers to enact regulations that impact navigable waters. Id. at 5.

[193] In Rentner v. Village of Burnham, 82 Ill. 1175 (1984), boat owners were fighting a mooring fee charged by the local government. The court held that the commerce clause was inapplicable to recreational boating in the immediate context, because the boaters did not cross state lines. In Bass River Associates v. Mayor of Bass River, 743 F.2d 159 (3rd Cir 1984), the court held that a township's prohibition of floating homes was not preempted by federal regulations, however also concluded that the township could not prohibit temporary mooring or anchoring of a vessel within township waters. The court did not establish any guidelines which would define exactly how long "temporary" anchoring or mooring might be.

arbitrarily or purposefully discriminate against interstate commerce in favor of in-state interests; (B) laws which impose incidental burdens on interstate and foreign commerce that are clearly excessive in comparison to the local benefits, and (C) laws which serve to undermine the federal need for uniformity among states in particular areas, such as interstate transportation and foreign trade.[194]

In analyzing the fourth question, the Coast Guard took into account the regulation of anchoring and navigation as an undue restriction of a boater's right of free navigation. This question provided a relatively favorable outcome on the behalf of boaters and those who do not support anchoring restrictions.

The Coast Guard found that a state cannot completely bar the passage of a vessel through concurrent state and federal waters.[195] Likewise, they provided evidence that the right of navigation includes, as a necessary incident, the right of anchorage[196] and that a vessel anchored for up to two years

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[194] Coast Guard Memo #16501, Dec. 30, 1992: 6.

[195] Id at 6. Any navigable waters within state boundaries are subject to both State and federal authority. In Douglas v. Seacoast Products, 431 U.S. 265, 97 S.Ct. 1740 (1977), the court held that the barring of a vessel through concurrent state and federal waters would likely violate the indisputable precept that no state may exclude federally licensed commerce.

[196] Kuramo v. Hamada, 30 Haw. 841 (1929).

can still be found to be "in navigation".[197] The memorandum went on to state that "any state regulation narrowly restricting a vessel anchoring in state waters, even on a long term basis, may well be an unreasonable ban on the right of free navigation within joint state and federal waters".[198] Case law, however, is "unhelpfully silent on this particular issue".[199]

In examining the final question, regarding the statutory obligation of the Coast Guard, representing the federal government, to resolve the anchoring conflict, the legal study concluded that the Coast Guard has no statutory obligation to monitor the constitutionality of state laws, or take legal action against a state.[200] Furthermore, the Coast Guard "is under no affirmative duty to aid private citizens who believe a state is treading upon a federally preempted right".[201] The Coast Guard authorities also bear mention of Executive Order #12612,[202] which mandates that all federal agencies

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[197] In U.S. v. Monstad, 134 F.2d 986 (9th Cir 1943), the court found that a barge anchored in one position for more than two years without getting underway was "in navigation:. Id.

[198] Id.

[199] Id.

[200] Id. See also Heckler v. Chaney, 470, U.S. 821, 838 (1985).

[201] Id. at 7.

[202] Executive Order #12612, "Federalism", Oct. 26, 1987.

are to avoid asserting their preemptive powers over state and local government action. The Order allows preemption claims only where a federal statute contains an express provision, or where there is evidence that Congress intended to so preempt.[203]

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[203] Coast Guard Memorandum #16501, "Federal vs. State Regulation", Dec. 30, 1992: 7.

CHAPTER IV: THE TEST CASE

A. HNWPS v. Hawaii

1) Background of the Case

During the late summer months of 1992, the conflicting interests between state offices concerned with the regulation of vessels within state waters, and boater interest groups concerned with securing a declaration of a fundamental right to anchor became the basis of a legal confrontation. This confrontation eventually materialized into the case known as Hawaiian Navigable Waters Preservation Society v. State of Hawaii,[204] (HNWPS v. Hawaii). The plaintiff, Hawaiian Navigable Waters Preservation Society (the Preservation Society), is a non-profit corporation whose immediate interest was to stay the enforcement of, if not overturn, Hawaiian laws which were enacted in order to regulate both mooring and anchoring.[205]

Act 379 of the 1988 Hawaiian Session Laws, provided the Hawaii Department of Transportation with the authority to regulate both anchoring and mooring of vessels within the

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[204] Hawaiian Navigable Waters Preservation Society v. State of Hawaii, 823 F. Supp. 766 (1993).

[205] Id.

state's navigable ocean waters, and navigable streams.[206] In 1991, some jurisdictional authority over recreational boating was transferred to the Department of Land and Natural Resources (DLNR).[207]

In 1991, the Hawaii Department of Transportation, pursuant to its authority under the Hawaii Administrative Procedures Act,[208] adopted similar rules regulating anchoring and mooring in state waters (Appendix).[209] Subsequently, the Department of transportation was issued a federal permit for the installation of approximately 360 moorings at Ke'ehi Lagoon.[210] Prior to the grant of permission for the installation of moorings, Ke'ehi lagoon had been established as a special federal anchorage zone.[211]

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[206] Haw. Sess. Laws, Act 379, 1988.

[207] Haw. Sess. Laws, Act 272, 1991.

[208] Hawaii Administrative Procedures Act, Haw. Revised Statutes, 91-1, et seq.

[209] Id. Hawaii Administrative Rules regulates small boat harbors.

[210] Ke'ehi Lagoon is located on the island of Oahu, almost directly between Honolulu and Pearl Harbor. Ironicly, it is also located relatively close to Kuapa Pond and the Hawaii-Kai marina, which are to the east of Honolulu. Kuapa Pond was the area in question in Kaiser Aetna.

[211] As mentioned previously in the chapter regarding the Coast Guard legal review, 33 C.F.R. establishes two broad classes of anchorage regulations: special anchorage areas (Subpart A) and anchorage grounds (Subpart B). The waters of Ke'ehi Lagoon fall under the regulatory stipulations of Subpart A, which states:

"The areas described in Subpart A of this part are designated as special anchorage areas pursuant to the authority contained in an act amending laws for preventing

Essentially, this allows vessels 65 feet or less in length to anchor without being required to display a white light, indicating that such vessel is at anchor. It also indicates that the Coast Guard extended regulatory authority over Ke'ehi lagoon. Apparently, this extension of federal authority was thought by the plaintiffs to supercede all state regulations, and was subsequently one of their points of contention.

In commencing legal action, the Preservation Society sought to challenge the constitutionality of all Hawaii regulations and legislation affecting the rights of mariners to navigate and anchor in the ocean waters surrounding the islands of Hawaii. They contended that such regulations are constitutionally infirm, and further argued that Congress has both exclusive jurisdictional control over such matters, and has explicitly and implicitly preempted Hawaii's comprehensive regulatory regime.[212] In formulating their argument, the Preservation Society based their suppositions on the federal preemptive authority established through the retention of the navigation servitude in the Submerged Lands Act,[213] the scheme of special federal anchorage grounds established pursuant to 33 U.S.C., Section 471, and federal safety

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collisions of vessels....Vessels not more than 65 feet in length, when at anchor in any special anchorage shall not be required to carry or exhibit the white anchor lights required by the navigation rules". 33 C.F.R Sect. 110.1 (A).

[212] HNWPS v. Hawaii, 823 F. Supp. 766 (1993): 4.

[213] Id. See also Submerged Lands Act of 1953, 43 U.S.C. at 1301.

regulations also set forth in 33 U.S.C., Section 1602.[214] Additionally, the Preservation Society contended that the regulations act was an unconstitutional restriction on interstate commerce.[215]

In evaluating the case, the District Court was of the opinion that the parties involved had submitted matters beyond the scope of the pleadings, and therefore would only entertain motions for summary judgement, rather than judgement on the pleadings.[216] By entering into summary judgement, the court was able to evaluate the points of contention without the necessity of having the case heard by a jury. Also, as the case was a statutory review, a decision reached through summary judgement would enable the plaintiffs to bring the matter before the 9th Circuit Court of Appeals, in San Francisco, California.[217]

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[214] HNWPS v. Hawaii, 823 F. Supp. 766 (1993): 4.

[215] Id.

[216] Rule 56(C) of the Federal Rules of Civil Procedure provides that summary judgement shall be entered when:

"...the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law."

The moving party has the burden of identifying for the court, those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact. Id.

[217] Telephone interview with Morgan J.C. Scudi, Huth, Farmer & Scudi, 5440 Morehouse Dr., Suite 4400, San Diego, CA, 29121, (619) 58-1001, March 18, 1994. Through the telephone interview, Mr. Scudi indicated that the purpose of entering into summary judgement was that since this was a

2) The Findings of the Court

In examining the case, the court first undertook to define the ways in which state laws might be subject to federal preemption. It defined this by looking at the precedent set by three prior cases: Beveridge v. Lewis,[218] Ray v. Atlantic Richfield Co.,[219] and Rice v. Santa Fe Elevator Corp.[220]

In Beveridge, the issue at hand was similar to that being examined in HNWPS v. Hawaii. There, the court sustained the constitutionality of a municipal ordinance enacted by the city of Santa Barbara restricting both mooring and anchoring within the city harbor during the winter months. In rejecting the contention that the ordinance was preempted by the Ports and Waterways Safety Act[221] the court adopted the analysis for preemption which had been previously set forth in Ray. There, the court began its analysis with the reminder that prior cases have indicated that when a State's exercise of police

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statutory review, their goal was to both have the district court pass judgment on the legal contentions, and be able to get the case appealed in the 9th Circuit Court of Appeals. Mr. Scudi also indicated that he was of the mind that, based on its arguments, this case would be decided in favor of the State of Hawaii.

[218] Beveridge v. Lewis, 939 F.2d 859 (1991).

[219] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[220] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1950).

[221] Ports and Waterways Safety Act, 33 U.S.C. 1221, et seq.

power is challenged as being preempted by federal authority, "we start with the assumption that the historic police powers of the state were not superseded by the Federal Act, unless that was the clear and manifest purpose of Congress."[222] It then went on to explain that Congressional purpose may be evidenced in several ways; the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or the Act of Congress may touch upon a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[223] Thus, the court employed these two measures as their guidelines by which to determine federal preemption.

In charging that the Hawaiian statutes were subject to federal preemption through the Submerged Lands Act, the Preservation Society invoked Section 1311 (b) of the Act, which reads:

> The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources....Nothing in this subchapter...shall affect the use, development, improvement, or control by...the United States of said...waters for the purposes of navigation....[224]

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[222] HNWPS v. Hawaii, 823 F. Supp. 766 (1993). Quoting Rice.

[223] Id. at 4.

[224] Id.

The plaintiffs argued that the provision, a retention of the navigation servitude, is an expression of Congress' intent to retain exclusive jurisdiction over matters affecting navigation. The District Court, however, was of the opinion that the contention was without merit, and went on to state that the provisions did not offer any indication that Congress intended to retain exclusive, rather than concurrent jurisdiction over navigable waters of the states.[225] The court stated that:

> No court has read section 1311 (b) as a manifestation of Congressional intent to occupy the entire field of regulation of navigable waters. This is because there is no reason to suspect that the section is any more than an expression of the well-established proposition that the federal government retains a paramount navigation servitude in the waters of the states....The retention of this servitude does not, as plaintiffs suggest, mean that the federal government has exclusive control over state waters. All the retention of the servitude means is that the government may, without paying compensation, decrease the value of riparian property.[226]

The court interpreted the facts to mean that the

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[225] Id. The court stated that "Normally, if the language of a statute is unambiguous, its plain meaning controls." this plain language reading is supported by the legislative history of the Submerged Lands Act as well; the House Committee reporting on the Submerged Lands Act stated:

"...The bill provides that, except to the extent that it is exercised in a manner inconsistent with applicable federal laws, the police power of each coastal state may extend to that portion of the continental shelf which would be within the boundaries of such state if extended seaward to the outer margin of the shelf." H. Rep. No. 215, 83rd Cong., 1st Sess. 2 (1953).

[226] Id.

preemptive effect of the navigation servitude can be no greater than that of the commerce clause, from which it originates. Thus, federal action taken pursuant to the navigation servitude preempts state legislation only if such legislation is implicitly or explicitly preempted, or in conflict with federal law.[227] The court found no explicit or implicit conflicts to exist between the Submerged Lands Act and the Hawaiian anchoring regulations, thus by itself, the Submerged Lands Act could not sustain a claim of preemption.

The second point brought up by the Preservation Society was that of federal preemption under the provisions of the special federal anchorage area in Ke'ehi Lagoon.[228] Their contention here was that the establishment of a special federal anchorage area is indicative of Congress' extension of authority over the area, and that as such, additional state regulations are inherently preempted. In a related argument, the plaintiffs claimed that the Coast Guard's allowance of regulatory action within the lagoon by the state constitutes an impermissible delegation of power.[229]

As previously stated, the Coast Guard has Congressional authority to establish two broad classes of anchorage areas. Namely, these are special anchorage areas, and anchorage grounds. Designation of waters as a special anchorage area

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[227] Id.

[228] Id. at 8.

[229] Id.

allows vessels 65 feet and under the privilege of anchoring without the necessity of displaying anchor lights.[230] Designation of waters as an anchorage ground establishes such area as a mooring or anchoring field. As such, it might appear on a nautical chart as "anchorage", or moorings may be placed there pursuant to obtaining a permit for such.[231] As explained in the Coast Guard legal opinion, the state is allowed to exercise its police powers over such areas, as long as the provisions of such powers do not conflict with federal law.[232]

The court found that there was no actual conflict between state and federal regulation in Ke'ehi Lagoon, as state regulations did not purport to impose anchor-light regulations on vessels less than 65 feet in length in the lagoon.[233] The court drew reference to the Coast Guard legal opinion in stating that local governments may establish, maintain and charge reasonable fees for mooring within a federally designated special anchorage area.[234]

In assessing the Preservation Society's argument that the Coast Guard's allowance of state regulation within the

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[230] 33 C.F.R., Sect. 109.10.

[231] Id. at subpart (b).

[232] Coast Guard Memorandum, #16501, "Federal vs. State Jurisdiction", Dec. 30, 1992: 5.

[233] HNWPS v. Hawaii, 823 F. Supp. 766 (1993): 9.

[234] Id. Referring to Coast Guard Memorandum, #16501, "Federal vs. State Regulation", Dec. 30, 1992.

designated special anchorage area was an impermissible redelegation of authority to the State of Hawaii, the court responded by stating that it could not clearly comprehend the argument.[235] It did state, however, that there was no evidence that the Coast Guard abandoned its regulatory authority.[236]

The assumption to be made here is that the Preservation Society believed that by allowing any additional state regulatory stipulations to be enacted within the special anchorage area, the Coast Guard was ignoring its regulatory authority. This assumption is supported by a letter issued by the Coast Guard to the Key West Port and Transit Authority:

> Establishing the special anchorage zone places no obligation for mariners to anchor within it. Mariners are free to anchor anywhere in navigable waters where the act of anchoring is not prohibited by federal regulation. Similarly, vessels anchoring within the anchorage zone will not be obliged to use the installed moorings. You may collect a fee from those who choose to use your moorings, but the mariner is entitled to use an anchor at no fee and stay in the anchorage zone an indefinite period. These federal anchorage rights preempt any state or local statutes or regulations which may conflict with them.[237]

The statement refers to federal preemption, and seems to imply that the Coast Guard, as an arm of the federal

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[235] Id. at 10.

[236] Id.

[237] Chief, Seventh Coast Guard Dist., Letter to Director, Port and Transit Authority of Key West, # 16612, Ser. 1389, Nov. 21, 1991: 1.

government, may extend their power of preemption where additional laws are enacted in special anchorage areas. No reference to the preceding statement was ever made in HNWPS v Hawaii. It does, however, represent a valid point which was never raised in the case. Court documents, as well as telephone interviews, did not indicate that the plaintiffs were aware of the existence of the Coast Guard statement. This may account for it not being raised as an argument within the case.

The statement is also significant in that it conveys a much stronger opinion on anchoring rights than the more recent Coast Guard legal opinion, discussed in Chapter 3, Section 3. Coast Guard statements which were released prior to the point at which anchoring laws were first challenged in the federal court system (marked by the first stage of HNWPS v. Hawaii), generally take a more assertive view than those which were subsequently written. This is evidenced by the following two opinions released in 1981:

> The Coast Guard also administers anchorage regulations on the navigable waters of the United States. In order for states and local governments to establish and regulate anchorage areas, permission must first be obtained from the Coast Guard.[238]

> Lt. Griesbaum [indicated that town officials] in Indian Harbour Beach had absolutely no authority in the waterway area concerned, that the U.S. Code gave Coast Guard

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[238] R.C. Branham, Commander, Seventh Coast Guard District, Letter #16753/1 to Paula Hawkins, United States Senate, June 22, 1981.

> exclusive jurisdiction in the matter of anchoring in navigable waters. The Coast Guard, in turn, promulgated regulations now in the Code of Federal Regulations. The Coast Guard has not and will not delegate their authority to anyone. However, Griesbaum said we would not get a written answer from the Admiral commanding 7th District because of the helpful and extensive cooperation the Coast Guard gets and must have from the State, County and Municipal authorities in the matter of speed limits, pollution, illegal netting, boat inspections and registrations, and other law enforcement functions in the waterway areas which the Coast Guard simply cannot meet alone.[239]

The shift in assertive opinions may be best explained through the following Coast Guard memorandum, released in 1992:

> The title and opening paragraph of the article [reference to article in "Boaters' Monthly", Feb. 1992] suggest that the Coast Guard will take a proactive legal role to keep states or municipalities from enacting or keeping anchorage regulations. That is not the case. If a conflict is shown to exist between federal law and state or local anchoring regulations, then you are correct in stating that federal law will prevail. However, the Coast Guard has taken a long-standing policy of not commenting on the legality of state or local regulations if there is no direct conflict with federal law or regulations administered by the Coast Guard. No existing federal statute or court decision definitively states that local anchorage regulations - even those prohibiting anchoring - exceed the states' authority to exercise their police powers. Therefore, the courts, not the Coast Guard, must rule that a conflict exist[s] before federal preemption can occur.[240]

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[239] John Barnett, Office of the Florida State Attorney, Memorandum addressed to W.J. Patterson, March 20, 1981.

[240] R.D. Peterson, Seventh Coast Guard District, Memorandum #16617 to Valerie Jones, Concerned Boaters, March 6, 1992.

Here, Coast Guard opinions more closely reflect those of the legal opinion described in Chapter 3. As there are no documents which definitively state the reasons for a change in the assertive character of Coast Guard opinions, the conclusion to be drawn here is that the Coast Guard is acting within the policy of "not commenting on the legality of state or local regulations where there is no direct conflict with federal law or regulations administered by the Coast Guard". As the anchoring conflict is currently under the judicial scrutiny of the federal courts, and no federal statute expressly states that the individual states may not regulate anchoring, the legality of such laws is still questionable, and a firm statement by the Coast Guard could potentially bias the opinions of the courts.

The next argument brought to consideration by the court was that of the Hawaiian regulations being too narrow in scope to allow for an acceptable degree of vessel safety. In support of their argument, the plaintiffs cited 33 C.F.R. Section 2030.[241] This section provides in part that:

> A vessel at anchor shall exhibit where it can best be seen:
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> (i) in the fore part, an all-around white light or one ball; and
> (ii) at or near the stern and at a lower level than the light prescribed in subparagraph (i), an all-around white

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241 HNWPS v. Hawaii, 823 F. Supp. 766 (1993): 10.

light.[242]

Apparently, the plaintiffs read these regulations to imply that a vessel would necessarily have to be manned in order to adequately display such anchor lights, and that Hawaiian law impinged on this supposition. Section 2030, however, does not require anchored vessels to be constantly manned.

The court found that on an ordinary, clear night, the maintenance of a proper anchor light is the only precaution necessary to warn other vessels, and as such is the only requirement which the mariner must meet.[243] The court further went on to state that even if federal regulations did create some duty to maintain an overnight presence on a vessel at anchor, there is no evidence that this is in conflict with Hawaiian law.[244] Hawaiian law provides for liveaboard fees to be paid by individuals using a moored vessel as a place of principal habitation.[245] As there is no statutory obligation for one to live aboard one's vessel, the court reasoned that there is likewise no obligation for the mariner to pay a liveaboard fee.[246] Hawaiian regulations do not

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[242] Id. at 10. Citing 33 C.F.R. Section 2030.

[243] Id.

[244] Id.

[245] HRS Section 266-21.

[246] Id.

prohibit a person from living aboard a vessel, however they do establish a scheme of fees to be paid if one chooses to live aboard a vessel.

In denouncing this contention, the court stated that "...the affidavits submitted by plaintiffs indicate nothing more than the fact that plaintiffs are dissatisfied with having to pay the mooring fees charged by the state of Hawaii."[247]

Next, the court undertook to examine the question of implicit federal preemption through the sources cited by the plaintiffs. Again, relying heavily on Beveridge, the court noted that:

> Just because Congress has intended to reduce the possibility of cargo and vessel loss, prevent damage to structures on or near navigable waters, ensure that vessels comply with certain standards, and just because it believes that navigation and vessel safety and protection of the marine environment are matters of major national importance does not mean that the [state] is completely trammeled in all regulatory efforts.[248]

The court went on to state that although it is undisputed that the Secretary of Transportation and the Coast Guard have extensive authority to regulate anchoring, mooring and the movement of vessels, these powers are discretionary. The authorities may act to affect any of the afore-mentioned

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[247] Id.

[248] Id. at 11. Noting that which was found in Beveridge.

navigational issues, but they are not required to do so. Thus, the court concluded that the Submerged Lands Act and the provisions cited within 33 U.S.C. do not implicitly preempt the regulatory scheme of Hawaiian anchorage laws.

Finally, the court took into consideration the argument that Hawaiian regulations act as an unconstitutional restriction on interstate commerce. The Preservation Society had asserted that all vessels entering Hawaii are engaged in interstate commerce. Although they cited no authority, it may be presumed that their contention was based on the fact that travel to the State of Hawaii necessitates passage over the high seas, and likewise, travel among the islands also periodically requires passage over the high seas. Typically, the federal government is the regulatory authority over transportation over the high seas. The court found no evidence to indicate that Hawaiian anchorage laws act as an unconstitutional burden on interstate commerce. This is primarily because the plaintiffs failed to introduce evidence which would support such an argument.

In reaching this decision, the court first cited a previous Hawaiian case, Matson Navigation v. Hawaii Pub. Util. Comm.,[249] in which the court held that the State of Hawaii may regulate transportation among the islands, as long as such regulations are not in conflict with any existing federal

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[249] Matson Navigation v. Hawaii Pub. Util. Comm., 742 F. Supp. 1468, 1484 (D. Haw. 1990).

regulations.[250] Although the court also recognized that Congress has the power, under the commerce clause, to regulate commerce involving navigable and international waters (high seas), this power does not preclude the State of Hawaii from regulating commerce between places within the state solely because it involves such waters. The court stated that:

> To hold that the State of Hawaii may not regulate transportation between islands, even where there is no federal regulation, merely because such transportation passes over the high seas, would in effect place Hawaii on a different footing than the rest of the states in the union. It would also create an anomalous situation where such shipping and shippers would in fact be wholly unregulated to the severe detriment of the people of Hawaii.[251]

Although the court conceded that the instant regulations may act to create an indirect burden on interstate commerce by regulating the mooring of vessels that at some time originated out of the state, such regulation is "permissible if the state regulates evenhandedly, has a legitimate interest, and the local benefits outweigh the burden on interstate commerce".[252] As the Preservation Society produced no evidence showing that the state had regulated mooring or anchoring in an unreasonable manner, the court found their argument without merit.

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[250] HNWPS v. Hawaii, 823 F. Supp. 766 (1993).

[251] Id. at 13.

[252] Id.

Thus, the court upheld the authority of the state in imposing the noted restrictions on vessels within its navigable waters:

> The court finds that the State of Hawaii has a legitimate interest in insuring the safe use of ports by recreational boaters and that the contested regulations are rationally related to this objective. HRS Sections 200-4 and 200-6 were established to avoid conflicting uses between recreational ocean users and vessels conducting passive mooring and anchoring activities. The state concluded that such conflicting uses posed a substantial threat to public safety because of the heavy water traffic at Ke'ehi Lagoon. The court finds that this response was not irrational.[253]

The court likewise would not grant the plaintiffs' request to stay the enforcement of the Hawaiian laws until such time as the matter would be heard before the Court of Appeals.[254] As of the time when this research was undertaken and the results printed, the case was pending appeal in the 9th Circuit Court of Appeals in San Francisco, California and no hearing date had yet been determined.[255]

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[253] Id. at 14.

[254] In order for a court to grant a motion to stay enforcement of laws pending a legal review, the moving party must be able to show (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor. The court was not of the opinion that the forthcoming legal appeal would satisfy either of these requirements. Id. at 15-16.

[255] Telephone conversation with agent in charge of docketing, San Francisco Cir. Ct. of App., March 29, 1994.

B. Review of HNWPS v. Hawaii

In HNWPS v. Hawaii, the logic which was used by the court to arrive at conclusions seems to have been correctly employed; the court made reasonable conclusions based on the material which was presented by the parties involved. Ordinarily, such means of passing judgement would be satisfactory. Specific statutes, legal and historical doctrines, and case history may be available to provide the court with a clear set of guidelines to follow when interpreting a conflict, comparing it to others, and ultimately reaching conclusions. Thus, legal conclusions may be reached by repeatedly casting one's bucket into the well of existing knowledge. With regard to the anchoring conflict, however, the well of knowledge is surprisingly shallow. Very little case history exists which would aid legal interpreters in being able to reach conclusions based on prior fact, and the body of legislative coverage is commonly held to be piecemeal at best.[256] In reviewing HNWPS v. Hawaii, the court may have correctly interpreted the letter of the law, where such letter was provided, however the review may also have been too narrow in scope to correctly evaluate the spirit

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[256] Elaine Dickinson, Assistant Vice President of Boat/U.S. Telephone Interview of March 16, 1994. Ms. Dickinson's views of a "piecemeal" legislative body are descriptive of the views of most of the parties with whom the researcher has likewise conversed.

question was not established by the Coast Guard as a security zone.[261] Thus, the immediate laws may be seen as the city's exercise of police power in promoting what it believes to be the public good.

As in HNWPS v. Hawaii, the plaintiffs were a group of owners of boats which were either anchored or moored within the prohibited area. Likewise, they sued the city for injunctive relief based on the premise that the regulations were preempted by federal law.[262] The court dismissed charges of federal preemption, and upheld the validity of the city ordinance.[263] The validity of the court's decision may be questioned, however, when compared to a similar, more recent ruling handed down by a Florida circuit court. This ruling overturned a local ordinance which, like the Santa Barbara ordinance, allowed anchoring in an area at certain times, yet prohibited it during others.[264]

At the heart of the Florida case was a challenge to a park ordinance, enacted in the John Pennekamp Coral Reef State Park, prohibiting anchoring at night. The regulations were enacted to prevent environmental damage: specifically damage

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[261] Id.

[262] In addressing the question of federal preemption, the plaintiffs based their argument primarily on preemption under the Ports and Waterways Safety Act, 33 U.S.C.A. ss 1221 et. seq. Id. at 1.

[263] Id.

[264] Boat US Reports, "Judge Throws Out Anchoring Restriction", Vol. XXIX, Jan. 1994: 3.

public safety.[269] However, in neither instance do the case reports indicate that these assertions were substantiated by fact. This would indicate that the court's decisions may have been flawed.

While the plaintiffs in HNWPS v. Hawaii sought to challenge the constitutionality of all Hawaiian anchorage laws, the only ones which were examined by the court were HRS 200-4 and HRS 200-6[270]. Ignored by the court were other laws, which may contradict some of the legal findings in the immediate case.[271] One law of concern is HRS 266-21, which provides:

> (1) No more than fifteen percent of the respective total moorage space available...at the Ala Wai and Ke'ehi boat harbors [be available] for liveaboard purposes.
>
> (2) [permit application, mooring and liveaboard fees] shall be higher for non-residents [of the State of

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[269] In HNWPS v. Hawaii, the court stated that: "...Hawaii has a legitimate interest in insuring the safe use of ports by recreational boaters and that the contested regulations are rationally related to this objective...[the ordinances] were established to avoid conflicting uses between recreational ocean users and vessels conducting passive mooring and anchoring activities." HNWPS v. Hawaii, 823 F. Supp. 766 (1993): 14. Although the court cites the reasons for the enactment of the ordinances under question, nowhere in the case report is there evidence that the state provided proof to substantiate these assertions. Likewise, in Beveridge v. Lewis, the case report indicates that the ordinance under question was enacted largely "to protect [the waterfront facilities] from possible damage." Beveridge v. Lewis, 939 F.2d 859 (1991): 29. Again, nowhere in the report is there proof to substantiate the assertion.

[270] HNWPS v. Hawaii, 823 F.Supp. 766 (1993).

[271] The court did not examine Haw. Rev. Stat. 266-21.1-3.

a common law right of access to the ocean. Although they did not argue their case as one involving the public trust doctrine, the court supplied the view that the "public trust doctrine dictates that a beach and ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."[275]

Likewise, in a similar New Jersey case, Brindley v. Borough of Lavalette,[276] the court held that the borough, by maintaining a boardwalk, pavilions, and bathing facilities, had acquired a public easement for recreational purposes by adverse users. Thus, an ordinance discriminating against non-residents was held void.[277]

In HNWPS v. Hawaii, the court "relied very heavily on the Coast Guard [legal] opinion" in drawing many of its conclusions.[278] One of the provisions of the Coast Guard legal opinion is a section which delineates under what circumstances the Supreme Court has previously invalidated state laws through the power of the commerce clause. Included in these circumstances are "laws which purposefully or arbitrarily discriminate against interstate commerce in favor

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[275] Id. at 47.

[276] Brindley v. Borough of Lavalette, 33 N.J. Super. 344 (1954).

[277] Id.

[278] Flannery, "Judge upholds Hawaii anchoring law", Soundings, May, 1993: A8. Quoting Katherine Bell-Moss, attorney for the Preservation Society from San Diego.

attorneys involved in challenging anchoring laws, and has also organized a battery of attorneys currently working on a voluntary basis on HNWPS v. Hawaii.

A similar conversation with Elaine Dickinson, Assistant Vice President of Boat/US, a national boater lobby group, provided additional insights into the absence of the public trust doctrine in challenging anchoring laws. Dickinson indicated that her group preferred not to invoke the public trust, based on it's "nebulous character". She went on to say that inconsistencies in its interpretation by different courts could potentially undermine her group's contentions. Likewise, she pointed out that the inherent cost of bringing a public trust challenge to trial would be impractical: "...because of its nebulous character, a public trust challenge could take ten years and cost well over a hundred-thousand dollars to resolve, and even then we're not sure what the outcome will be."[283] Boat/US is the lobby group which was instrumental in getting the Coast Guard to conduct their legal investigation into state versus federal regulation of anchoring.

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[283] Telephone interview with Elaine Dickinson, "Boat/U.S.", March 16, 1994.

C. The Future of HNWPS v. Hawaii

Thus far, HNWPS v. Hawaii has been heard only at the district court level. This is representative of the first stage in a potentially long legal process which could ultimately result in the case being heard before the Supreme Court of the United States.

Essentially, the United States judicial system is a dual-court system.[284] The Constitution dictates what types of cases may be heard under the jurisdiction of the federal courts. Included here are admiralty and maritime cases, cases reviewing the actions of certain federal administrative agencies, civil suits under federal law, and cases arising under the Constitution, the laws of the United States, and treaties.[285] By implication, matters not assigned to the federal courts through the Constitution are heard in the state courts. The question in HNWPS v. Hawaii clearly falls within the parameters of federal court authority, thus, focus is on the judicial process of the federal, rather than the state, judicial system.

There are three components of the federal court system,

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[284] James Wilson, American Government: Institutions and Policies, Lexington, Mass., 1989: 400.

[285] The Constitution of the United States, Article III, Sept. 17, 1787, and Eleventh Amendment, 1795.

the first of which is the network of District Courts. There is one District Court in each of the 94 United States districts, and these courts are entrusted with original jurisdiction over matters brought before them.[286] District Courts do not have the power to hear appeals. The immediate case has already been heard before a District Court.

The second component in the federal court system is the network of Circuit Courts of Appeals. There are a total of twelve of these courts, representing each of the eleven regional circuits, and the District of Columbia.[287] Courts of Appeals hear only appeals from Federal District Courts, U.S. regulatory commissions, and certain other federal courts. The majority of cases heard in the Courts of Appeals begin in the Federal District Courts.[288] Currently, HNWPS v. Hawaii is slated to be heard before the Ninth Circuit Court of Appeals in San Francisco, California, but as of yet, no hearing date has been determined.[289]

The third component in the federal court system is the Supreme Court of the United States. The Supreme Court may extend original jurisdiction over cases involving conflicts between two or more states, the United States and a state,

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[286] Wilson, American Government, Lexington, 1989: 401.

[287] Id.

[288] Id. at 40.

[289] Telephone Conversation with Clerk's Office, 9th Cir. Ct. of App., San Francisco, Ca., March 30, 1994.

foreign ambassadors and other diplomats, and a state bringing action against a citizen of another state.[290] The Court also has, under certain circumstances, appellate jurisdiction over cases coming from the lower federal courts or the highest state court.[291] As HNWPS v. Hawaii is not representative of an issue over which the Supreme Court may extend original jurisdiction, the only way it may find itself there is through the Court's appellate jurisdiction.

There are essentially two routes by which HNWPS v. Hawaii may end up in the Supreme Court. One is by an appeal, while the other is by a writ of certiorari. There are only a few matters which may qualify for an appeal. In general, these involve clear constitutional issues, such as when a federal court has found a federal law to be unconstitutional, or has found a state law to be in conflict with federal laws or the Constitution, or likewise, when it has upheld a state law against a claim that it is in violation of a federal law or the Constitution.[292] HNWPS v. Hawaii may clearly qualify for an appeal under these circumstances.

The more common route to the Supreme Court is through a writ of certiorari. This is a process by which the court makes, as the Latin word suggests, an issue "more certain". This procedure may be invoked when the decision of a Federal

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[290] Wilson, American Government, Lexington, 1989: 401.

[291] Id.

[292] Id. at 402.

Court of Appeals involves the interpretation of a federal law, or the Constitution. Either side involved in a case may ask the Supreme Court for certiorari, and the Court may use its discretion in deciding whether or not to grant it.[293] As HNWPS v. Hawaii involves the interpretation of the scope of the navigation servitude (as set forth in the Submerged Lands Act), the Supreme Court may be asked to hear the case through a writ of certiorari.

Although the immediate case does seem to qualify to be heard before the Supreme Court through both of the appellate routes, the overall chances of cases making it that far are quite slim. Only about ten percent of the Supreme Court's cases arrive by appeal, while roughly ninety-five percent of the requests for certiorari are rejected.[294] Likewise, the costs of having a matter heard in the federal courts are high, as are the costs of appeal, lawyers fees, certiorari costs, copies of court records, petitions, and other miscellaneous matters. The hinderance imposed by cost is compounded by the amount of time involved in resolving an issue in the federal courts. Ultimately, although HNWPS v. Hawaii may end up before the Supreme Court, the process is both long and complex, ensuring that the issue will not be resolved in any short period of time.

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293 Id.

294 Id. at 402, 403.

CHAPTER V: ANALYSIS AND CONCLUSIONS

A. Introduction

In review of the data which has been compiled thus far, it is now possible to begin to analyze the hypotheses previously delineated in Chapter 1. It is the goal of the forthcoming chapter to provide the synthesis by which the relevant data may be used to either support or undermine the hypotheses. The hypotheses purport that:

1. Anchoring can be proven to be an act of navigation.

2. Laws which restrict anchoring, such as those noted in HNWPS v. Hawaii, unnecessarily restrict interstate commerce.

3. Laws which restrict anchoring, such as those noted in HNWPS v. Hawaii, unnecessarily restrict public rights associated with the public trust doctrine.

4. State-imposed anchorage laws which unnecessarily restrict interstate commerce or public trust rights will be deemed unconstitutional.

B. Anchoring within the purview of navigation

One of the issues lying at the heart of the anchoring conflict has to do with the definition of 'navigation', and more specifically, the relationship of anchoring to that definition. It has already been established that free

navigation is ensured under federal protection. The federal navigation servitude (Chapter II, Section B), the offspring of the commerce clause within the United States Constitution, gives paramount right to the federal government to compel the removal of any obstruction to navigation. The navigation servitude is subsequently codified through the Submerged Lands Act (Chapter III, Section A). The Act, though granting jurisdictional use of said lands to the individual states, provides that:

> The United States retains all of its navigation servitude and rights in and powers of regulation and control of said lands for the constitutional purposes of commerce, navigation, national defense and international affairs.[295]

Although it has already been established that anchoring is an activity associated with public trust rights (Chapter II, Section A), anchoring as a right under the public trust doctrine may be substantially reinforced by its association with navigation, a more traditional public trust right. Traditional rights enjoyed by the public in public trust areas are those of fishing, fowling, navigation and recreation. The association of public trust rights with anchoring and navigation shall be discussed at a further stage of the analysis. At this juncture, it is more important to delineate exactly how anchoring is an act of navigation, while keeping in mind the significance of that association with factors such

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[295] Submerged Lands Act of 1953, 43 U.S.C., Section 1314 (a).

as the navigation servitude and public trust doctrine.

In Chapter I, Section B, six legal cases are discussed which both expand the definition of navigation and associate anchoring with such a definition. These cases are Bowen v. Hope, The Idaho, Locke v. State, Sayer v. State, United States v. Monstad, and Kuramo v. Hamada. Each one of these cases is significant in supporting the premise that anchoring is an act of navigation. In Bowen, the earliest of the cases, a vessel anchored while at sea was shown to be engaged in navigation. The association between anchoring and active navigation was subsequently echoed in Monstad, wherein a vessel anchored for a period of more than two years was also held to be in navigation. Of further importance in Monstad is the fact that a time-frame was established, during which the vessel never ceased to be engaged in navigation. As the court held that the anchored vessel was in navigation for a period of approximately two years, such legal precedent may be used in the future to challenge time limitations which could be associated with anchoring laws.

In both Bowen and Monstad, the issue central to the case was whether an anchored vessel was engaged in navigation. in both cases, the individual courts ruled that anchored vessels were in fact engaged in navigation. While the cases deal directly with the question of anchoring as an act of navigation, other cases, such as Sayer and Kuramo have indirectly provided opinions on the matter.

In Sayer, the issue central to the case involved a boat which was moored at a terminal, rather than anchored. Although the act of mooring a vessel at a terminal differs substantially from that of anchoring, the court addressed the definition of navigation and held it to include anchoring. Likewise, in Kuramo, although the issue was one of an individual's attempt to establish exclusive rights over a parcel of submerged land, the court examined the question of navigation, and ruled that it includes, as incident, the anchoring of a vessel.

Research has resulted in the finding of at least four legal cases which specifically state that a vessel which is lying at anchor is actively engaged in navigation. Not only do these cases support the premise that anchoring is an act of navigation, but they are also indicative of a degree of consistency in the evaluation of such a question. Consistency in interpreting the definition of navigation to include anchoring is significant in that it sets a logical path by which courts have and should continue to define one of the key elements in the anchoring issue.

While the four previously mentioned cases deal with the association of anchoring to navigation, two other cases also discussed in Chapter I, Section B, deal with the expansion of the term 'navigation'. This expansion includes factors other than anchoring, but which are still of significance in understanding the scope of navigation and how the broadened

scope might affect anchoring laws. These two cases are The Idaho, and Locke.

In The Idaho, the court expanded the definition of navigation to include activities incidental to making a journey. Such activities include taking on passengers and cargo, stowage of cargo, and the general management of a vessel. Subsequently, in Locke, the court held that the definition of navigation can include a period of time, such as when a vessel is passing through a canal, when the vessel is subject to the actions of people not even aboard the vessel at such time. These cases signify the expansion of the definition of navigation, and might prove useful in the resolution of future issues.

The evidence which has been compiled indicates that anchoring can be proven to be an act of navigation. This is in support of the first hypothesis. The fact that vessels which are at anchor are engaged in navigation is perhaps one of the most significant findings of the study. Primarily, this is because the incorporation of anchoring within the definition of navigation creates the potential for legal interpreters and policy-makers to expand the jurisdictional authority of the federal navigation servitude, the Submerged Lands Act, and the public trust doctrine to specifically encompass anchoring. As all of these legal guides protect the right of free navigation, and as anchoring is an act of navigation, it follows that anchoring is implicitly, a federally protected

right. This is of importance in analyzing the validity of state-imposed anchorage laws, and ultimately deciding whether such laws are constitutional.

C. Anchoring laws as restrictions on interstate commerce

The importance of maintaining free channels of interstate commerce has long been recognized by the federal government. The federal navigation servitude (Chapter II, Section B) gives the federal government a paramount right to compel the removal of any obstructions to navigation in order to ensure unrestricted interstate commerce. This power is derived from the commerce clause of the Constitution.

The link between interstate commerce and navigation was established in Gibbons v. Ogden,[296] where the Supreme Court defined the nature of interstate commerce as comprehending navigation. As the definition of navigation has likewise been shown to comprehend anchoring, it follows that anchoring is incidental to interstate commerce. In this respect, laws which restrict anchoring may also restrict interstate commerce. The constitutionality of anchoring laws may be determined based on the relationship of such laws with interstate commerce. If anchoring laws are restrictive of interstate commerce, then such laws would logically be unconstitutional. If, however, anchoring laws do not restrict interstate commerce, then such laws may indeed be justifiable extensions of state authority. Although the immediate purpose is to determine whether or not anchoring laws, such as those noted in the test case, serve to

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[296] Gibbons v. Ogden, 22 U.S. (9 Wheat) 23 (1824).

restrict interstate commerce, the broader implications of the results of such a determination should be kept in mind during this stage of the analysis.

In the test case (Chapter IV, Section C), the District Court examined some, but not all of Hawaii's statutes which affect anchoring and navigation. In reviewing the case, the court admitted that the regulations which were noted (HRS 200-4 and HRS 200-6), may have created an indirect burden on interstate commerce. While the court went on to state that "such regulation is permissible if the state regulates evenhandedly",[297] it failed to acknowledge other Hawaiian laws which regulate in an inequitable manner.

One law which was not examined by the court in the test case is HRS 266-21. This statute establishes guidelines for higher application fees, mooring fees and liveaboard fees for non-residents of Hawaii than for residents. Other Hawaiian statutes, such as HRS 200-6, require that a permit be obtained in order to legally anchor a vessel in the waters of the state. As a non-resident is required to pay more for a permit application than a resident, it is evident that the state is not regulating in an evenhanded manner. In fact, through the regulatory scheme, the state has set up a system which discriminates against non-residents of Hawaii, favoring in-state interests. This, using the logic of the court, creates an anomalous situation, constituting an impermissible burden

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297 HNWPS v. Hawaii, 823 F. Supp. 76, (1993): 13.

on interstate commerce. Likewise, it is in support of the premise that laws which restrict anchoring, such as those noted in the test case, unnecessarily restrict interstate commerce.

In the legal opinion of December, 1992 (ChapterIII, Section C), the Coast Guard addressed the question of state regulation of navigation being limited by the application of the federal navigation servitude. The Coast Guard noted that the Supreme Court has invalidated state laws under the commerce clause when such laws fall into three categories: (a) laws that arbitrarily or purposefully discriminate against interstate commerce in favor of in-state interests; (b) laws which impose incidental burdens on interstate commerce, which are clearly excessive in comparison to the local benefits; and (c) laws which serve to undermine the federal need for uniformity among states in particular areas, such as interstate transportation and foreign trade. It can be argued that the Hawaiian regulatory scheme touches upon each one of these points.

In light of discrimination against interstate commerce in favor of in-state interests, is the fact that the Hawaiian statutes treat vessels traveling among the islands as if they were not engaged in interstate commerce, when in fact such travel often necessitates passage over international waters. While such vessels may not have traveled to another state before re-entering Hawaiian waters, they may still be engaged

in interstate commerce for the purpose of the law. This is largely based on the decision handed down in Rentner v. Village of Burnham,[298] (Chapter III, Section C). Here, the court held that the commerce clause was inapplicable to vessels operating solely within the waters of a state. Had the vessels simply left the waters of the state, the commerce clause would have applied to such vessels.

In one respect, this argument may be countered by noting the court's decision in Matson Navigation v. Hawaiian Public Util. Comm..[299] In Matson, the court held that the State of Hawaii may regulate transportation among the islands, even though such transportation often involves travel over international waters. The court reached this decision based on the premise that if the State of Hawaii was not able to regulate intrastate travel, it would be placed on unequal footing with the rest of the states. However, in reference to the points raised in the Coast Guard opinion, to hold that a state may extend regulatory authority over transportation where such transportation takes place over international boundaries would itself create an anomolous situation and set Hawaii apart from the rest of the states. This could potentially serve to undermine the need for uniformity among states in particular areas, such as interstate transportation

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298 Rentner v. Village of Burnham, 82 N.D.Ill. 1175 (1984).

299 Matson Navigation v. Hawaii Pub. Util. Comm., 742 F. Supp. 1468 (1990).

and foreign trade. Thus, the Hawaiian regulatory scheme touches upon two of the ways in which the Supreme Court has invalidated state laws under the commerce clause.

A third link may be drawn by noting the high fees which are charged by the state to mariners seeking anchoring permits, moorings, and liveaboard privileges. Under HRS 266-21, permit application fees are in excess of one-hundred dollars for non-residents, while liveaboard fees may be over three times that amount for the same group. This may be indicative of incidental burdens which are clearly excessive in comparison to the local benefits. If so, it would constitute another point under which the Supreme Court has typically invalidated state laws through the use of the commerce clause. While the statistical data and economic indicators necessary to validate this point were not a facet of the immediate research, an analysis of fees collected by the state with respect to their local benefits should be considered as a subject which merits further research.

A final restriction on interstate commerce which is evident in the laws noted in the test case is the seventy-two hour time limit imposed on vessels within Hawaiian waters. In Bass River Associates v. Mayor of Bass River[300] (Chapter III, Section C), the court concluded that the township could not prohibit temporary anchoring of vessels within township

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300 Bass River Associates v. Mayor of Bass River, 743 F.2d 159 (1984).

waters, as such anchoring is protected under federal preemption. However, the court did not establish any guidelines which would define exactly how long "temporary" anchoring might be. If the precedent established in Monstad, where a vessel was still actively engaged in navigation after being anchored for two years, is applied in the immediate context, then a seventy-two hour time limit may further exacerbate the burden placed on interstate commerce by the Hawaiian statutes.

In conclusion, evidence indicates that laws which regulate anchoring, such as those noted in HNWPS v. Hawaii, unnecessarily restrict interstate commerce. This is in support of the second hypothesis, and necessary in order to draw conclusions as to the constitutionality of such laws.

D. Anchoring laws as restrictions of public trust rights

The public trust doctrine (Chapter II, Section A) is one of the oldest roots of modern common law. Historically, public rights of fishing, fowling, and navigation have been held to be nearly sacrosanct in public trust areas. In recent times, the scope of the public trust doctrine has been expanded to include both recreation and anchoring as additional public trust rights. Public trust areas include navigable waters of the United States and the lands underlying those waters up to, in almost all cases, the mean high tide line.[301] In theory, this makes almost every location that a vessel could conceivably anchor subject to the public trust.

Both the existence of the public trust doctrine as a facet of constitutional law, and its significance in enabling the federal government to use powers of preemption over state legislative acts, were affirmed in Illinois Central Railroad Co. v. Illinois (Chapter II, Section A). A major result of Illinois Central was the legal recognition of public trust rights to submerged lands. Again, this is important with regard to anchoring laws, as the entire act of anchoring, from traveling over navigable waters, to dropping an anchor

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[301] Most states recognize private property rights only over lands landward of the mean high tide line. Massachusetts, however, recognizes private property interests landward of the low tide line.

overboard and having it ultimately come to rest on the submerged lands, is within the purview of public trust rights. State action and laws which run contrary to the principles of the public trust doctrine act as a detriment to the public interest, and have typically been found to be unconstitutional. This concept should be kept in mind throughout this stage of the analysis, as it will ultimately help to answer the question of the constitutional status of anchoring laws.

Within the immediate context, the public trust doctrine is important in addressing anchoring laws in respect to the public rights of navigation, anchoring, and recreation.

Laws which affect anchoring implicitly affect the public right of navigation through the association of anchoring as an act of navigation. In this respect, laws which place burdens on anchoring likewise place burdens on the right of free navigation. Aside from being an act of navigation, anchoring has also been upheld to be a public trust right. In King v. Oahu Land and Railway Co. (Chapter II, Section A, Subsection 3), the court recognized that public trust uses include navigation, sailing and anchoring, while in Kuramo v. Hamada, the court held that the right of navigation includes the right of anchoring. These cases are of major significance to the test case. Hawaii has a history of both recognizing the public trust doctrine as a factor in shaping Hawaiian law, and incorporating anchoring within the realm of public trust

rights. Any attempt by the state to restrict these rights represents a significant departure from historic practice.

The existence of recreation as a public trust right has been affirmed in numerous legal cases. In Marks v. Whitney (Chapter II, Section A, Subsection 2), the court included recreation as a public trust right, while in Orion Corp v. Washington, the court stated that public trust rights include navigation, fishing, swimming, waterskiing, and other recreational purposes. It is almost inconceivable to exclude sailing and other manifestations of water-bourne travel from the purview of recreational activities. Indeed, in a state such as Hawaii, where tourism is a major industry, it is hardly arguable that the majority of mariners plying the waters of the state are engaged in some form of recreation.

Hawaiian anchorage laws set up a scheme by which permit and fee arrangements are established for both recreational and commercial vessels anchoring within the waters of the state. Seventy-two hour time-limits have also been established, and a discriminatory fee system between residents and non-residents has likewise been codified into law. It is evident that all of these state-sanctioned regulations impinge upon and unnecessarily restrict rights associated with the public trust doctrine.

The imposition of a time-limit on the anchoring of vessels within navigable waters is akin to placing a limit on the ammount of time that a bather may use a public beach. Such

regulation constitutes an intrusion into federally protected public trust rights. In the test case, neither the court nor the legislative history behind the Hawaiian statutes indicates the necessity of imposing a limit on the amount of time that a vessel may anchor. Thus, the exercise of state police power in promoting the public good is not justified in the immediate context. In this sense, laws which regulate the amount of time that a vessel may anchor, such as those noted in the test case, unnecessarily restrict rights associated with the public trust doctrine.

Permit requirements and fee arrangements are another means by which the statutes enacted by the state of Hawaii have affected rights associated with the public trust doctrine. By requiring a permit in order to anchor a vessel, the state has created a system in which the activity requires an official sanction in order to be legal. The extension of state authority and imposition of incidental burdens on a public right reduces the degree of freedom with which that right may be enjoyed. Such a burden may be a justifiable extension of a state's police power if there is clear evidence that such a burden is necessary in order to preserve the public good. As research has not revealed a need for such regulation, then the requirement of permits in order to anchor is not justified. Hence, laws which stipulate that permits must be obtained in order to legally anchor a vessel, impose an unnecessary restriction on a public right associated with

the public trust doctrine.

The fee arrangements enacted by the State of Hawaii are likewise an intrusion on public trust rights. While fees may typically be charged by state agencies for purposes such as motor vehicle registration, such fees are permissible, as the associated activity is more of a privilege than a public trust right. By implication, fees are intrinsicly exclusive in nature, as budget limitations may not allow an individual to afford the luxuries which are tied to said fees. Thus, to impose a fee arrangement as a prerequisite to the enjoyment of a public right creates a situation in which members of the public may be excluded from enjoying what would ordinarily be their right. This undermines the purpose of the public trust doctrine and runs contrary to state interests in promoting the public good.

The fee arrangement system in Hawaii is subject to further scrutiny by virtue of the fact that a discriminatory regime has been established in which non-residents are subject to pay more than residents for the permits which are required in order to legally anchor a vessel. Case history indicates that such laws seldom stand up to judicial scrutiny. This was indicated in Matthews (Chapter II, Section A, Subsection 2), where the court ruled that fee arrangements could not discriminate in any way between residents and non-residents. Likewise, in Avon, the New Jersey Supreme Court prohibited municipalities from charging higher fees to non-residents than

to residents for the use of city beaches. The conclusion in both of these cases was reached by examining the relation of local ordinances to the public trust doctrine. Hence, statutes, such as those noted in HNWPS v. Hawaii, further impose unnecessary restrictions on public rights associated with the public trust doctrine by discriminating between residents and non-residents.

In conclusion, it is evident that laws such as those noted in the test case unnecessarily restrict rights associated with the public trust doctrine. This is in support of the third hypothesis. Furthermore, in light of prior case history, it is unlikely that laws which discriminate between residents and non-residents, such as those enacted by the State of Hawaii, shall withstand judicial scrutiny if argued as cases involving the public trust doctrine.

E. The constitutionality of anchoring laws

The remaining question to be answered deals directly with the question of constitutionality and whether anchoring regulations are permissible or unconstitutional. As no legal precedent has been set which would provide a direct answer to such a question, conclusions must be drawn independent of such data. The evaluative case study method of research, which has been employed thus far in reaching conclusions, is especially important in the immediate instance. This is because it involves description, explanation and judgement of previously delineated facts. Judgement, in the immediate instance, is interpretive. Hence, conclusions shall suggest, but not prove the ultimate outcome of the constitutionality question. Judgement is reached by examining the association of anchoring laws to the navigation servitude and the public trust doctrine, both of which have been shown to be major factors by which previous constitutionality issues have been resolved.

In Section B of this chapter, the premise that laws which restrict anchoring unnecessarily restrict interstate commerce was substantially validated. In this respect, state-imposed anchoring laws are incongruent with the federal navigation servitude. Supreme court history indicates that where state law comes into conflict with the federal navigation servitude, such laws are typically invalidated as being repugnant to the

Constitution. This was made evident in Gibbons v. Ogden (Chapter II, Section B), where a New York State law was held to undermine the principles set forth in the commerce clause, and hence deemed unconstitutional. Applying the principles set forth in Gibbons to the immediate case, it is likely that laws which restrict anchoring will be judged to be unconstitutional, as they can be shown to restrict interstate commerce.

The public trust doctrine is another means by which the constitutionality of this issue may be judged. In Section C of this chapter, anchoring laws, such as those noted in HNWPS v. Hawaii, were shown to place unnecessary restrictions on rights associated with the public trust doctrine. As with the navigation servitude, when state legislation impinges upon public trust rights, such legislation has been previously found to be unconstitutional. This was established in Illinois Central (Chapter II, Section A, Subsection 2), where a state grant of submerged lands was found to be contrary to state interest in protecting the public trust, and rights inherent in that trust. Laws which similarly restrict public trust rights were likewise found to be unconstitutional in cases such as Matthews, and Avon. Hence, applying the principles set forth in these cases to the laws which have been discussed in the test case, it is likely that such laws will be judged as being unconstitutional, as they can be shown to unnecessarily restrict rights associated with the public trust doctrine.

As previously mentioned, the case study method of research is especially important to this stage of the analysis. Not only does it allow judgement based on the description and explanation of facts, but it also functions as a means of examining a specific instance in order to illuminate a general problem. In this case, HNWPS v. Hawaii is the specific instance wherein the general problem of state-imposed laws which restrict anchoring is illuminated. Applying the conclusions drawn from the analysis of the test case to the broader national arena, it is evident that any state-imposed law unnecessarily restricting the right of a mariner to anchor, serves as an unnecessary restriction of both interstate commerce and public trust rights. In this respect, and in support of the final hypothesis, such laws will in all likelihood be deemed unconstitutional.

F. Conclusions

In recent history, there has been a trend on the behalf of both state and federal agencies to gradually extend their jurisdictional and regulatory powers over waters which are increasingly further from the shore. As a nation, the United States has extended its regulatory authority from an original three-mile territorial sea with an adjacent nine-mile contiguous zone, to a current twelve-mile territorial sea with an adjacent one hundred eighty-eight mile exclusive economic zone. Through legislation such as the Submerged Lands Act, the individual states have likewise enjoyed an increasingly broader scope of jurisdictional control over coastal areas. As there has typically been a tendency for other coastal nations to follow the precedent in coastal policy set by the United States, the result is a movement of creeping jurisdiction, and the ultimate loss of the traditional high seas.

The loss of the traditional high seas as a result of creeping jurisdiction may be likened to the loss of traditional rights, such as anchoring, by the enactment of state laws which are increasingly affecting the purview of such rights. Similarly, such laws run contrary to the traditional values delineated through the Constitution, the cornerstone of American legal policy. If the remaining coastal states and states bordering navigable waterways enact laws

similar to those which currently exist in the State of Hawaii, it is conceivable that traditional rights of navigation, like the high seas, could be increasingly lost. In this respect, it is important to monitor the implications of state-imposed laws affecting navigation, in order to assess their congruency with existing federal and constitutional policy.

It is evident that state-imposed regulations which unnecessarily restrict the right of mariners to anchor within the navigable waters of the United States are not legitimate extensions of state authority, but rather unconstitutional restrictions of navigation. As such, the federal government has the power under the navigation servitude to preempt such laws. This power is primarily in the hands of the Coast Guard, but is limited by the imposition of Executive Order #12612 (Chapter III, Section C). The federal government may act to preempt such laws, but only after the courts have stated that anchoring is within the purview of the navigation servitude. Until such time, the only challenge to anchoring laws can come from individual citizens and public interest groups. Similarly, anchorage laws may be invalidated through the use of the public trust doctrine. While there exists a potentially strong public trust case against such laws, the drawback to a public trust challenge lies in the nebulous character of the trust, and the high amount of monetary and professional resources needed to effectuate such a challenge.

It is the opinion of the researcher that the interests of

all parties involved would be better served by attempting to resolve the matter through more interactive channels, such as through proper coastal zone management. As discussed in Chapter I, the interests in the coastal zone are both wide and varied, so that the intrinsic nature of coastal zone management is to provide some sort of balance in attempting to meet these needs. The enactment of legislation without taking into account the often divergent needs which are placed on the coastal zone often result in conflicts, such as those which currently exist between boater groups and the State of Hawaii. Proper coastal zone management may be the most effective means by which the resolution of these issues can come to fruition.

One example of how the anchoring conflict may be better resolved through coastal zone management can be seen in the State of Florida. Here, the coordination of efforts between state and boater interest groups has resulted in the establishment of three potential state-wide uniform plans currently under consideration by state legislators.

Florida's restrictive anchorage policies have been characterized as stemming from a "patchwork quilt" of differing laws enacted by different municipalities.[302] Negotiations have resulted in the creation of at least three potential options in establishing a uniform state-wide policy. The first option would allow boaters to anchor their vessels

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302 Boat/U.S. Reports, "Uniform Anchoring Guidelines Make Headway", November, 1993: 1

without restriction for up to fourteen days during any consecutive three-month period in a particular county. After the expiration of the fourteen day grace period, the vessel would have to be moved to a state-designated anchorage which may be managed by local government.[303] Under this option, local governments would be precluded from adopting a more restrictive anchorage policy than those allowed by the state.

The second option would allow vessels to be anchored without restriction except in areas designated as restricted zones. Restricted zones would be established only for water quality and/or habitat protection, protection of endangered or threatened species, ensuring equitable use of waterways by different users, preventing or minimizing hazards to navigation, and public health or safety.[304] This option would also preclude local governments from establishing restricted or prohibited areas, unless first approved by the state.

The third option would allow vessels to anchor for up to six months without restrictions in all waterways, except those mentioned in the second option. Vessels anchored for more than the six month per year limit would be required to use a managed anchorage.[305]

At this point, state officials are leaning towards the

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[303] Id.

[304] Id., at 8.

[305] Id.

second option.[306] This is perhaps the most wise route to follow, as restrictions on time-limits for the anchorage of vessels could potentially lead to legal action challenging the constitutionality of such regulations, and the subsequent perpetuation of the anchoring conflict.

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306 Id.

APPENDIX

HAWAII REVISED STATUTE (HRS) 190-4.5: Anchoring, boating, and mooring in marine life conservation distructs; rules.

(a) The department [DLNR] shall, pursuant to chapter 91, adopt rules for the regulation of anchoring and mooring in each marine life conservation district established under this chapter.

(b) Within its jurisdiction over ocean recreational boating and coastal activities, the department [DLNR] shall adopt rules pursuant to chapter 91 for the regulation of boating in each marine life conservation district established under this chapter.

HRS 200-4: Ocean recreation and coastal area rules.

(a) The chairperson may adopt rules necessary:
(1) To regulate the manner in which all vessels may enter the ocean waters and navigable streams of the state, and moor, anchor, or dock at small boat harbors, launching ramps, and other boating facilities owned or controlled by the state;
(2) To regulate the embarking and disembarking of passengers at small boat harbors, launching ramps, other boating facilities, and public beaches;
(3) For the safety of small boat harbors, launching ramps, and other boating facilities, the vessels anchored or moored therein;
(4) for the conduct of the public using small boat harbors, launching ramps and other boating facilities owned or controlled by the state;
(5) To regulate and control recreational and commercial use of small boat harbors, launching ramps and other boating facilities owned or controlled by the state and the ocean waters and navigable streams of the state;
(6) To prevent the discharge or throwing into small boat harbors, launching ramps, or other boating facilities, ocean waters and navigable streams, of rubbish, refuse, garbage or other substances likely to affect the quality of the water or that contribute to making the small boat harbors, launching ramps, other boating facilities, ocean waters, and streams unsightly, unhealthy, or unclean, or that are liable to fill up, shoal, or shallow the waters in, near, or affecting small boat harbors, launching ramps, and other boating facilities and the ocean waters of the state, and likewise to prevent the escape of fuel or other oils or substances into the waters in, near, or affecting small boat harbors, launching ramps, or

other boating facilities and the ocean waters and navigable streams of the state from any source point, including, but not limited to, any vessel or from pipes or storage tanks upon land. The rules may include:
(A) Requirements for permits and fees for:
(i) The mooring, docking or anchoring of recreational and commercial vessels at small boat harbors, launching ramps, and other boating facilities; or
(ii) Other uses of these facilities;
(B) Requirements for permits and fees for use of a vessel as a principal place of habitation while moored at a state small boat harbor;
(C) Requirements governing:
(i) The transfer of any state commercial, mooring, launching, or any other type of use or other permit, directly or indirectly, including, but not limited to, the imposition or assessment of a business transfer fee upon transfer of ownership of vessels operating commercially from, within or in any way related to the state small boat harbors; and
(ii) The use of state small boat harbors, launching ramps, or other boating facilities belonging to or controlled by the state, including, but not limited to, the establishment of minimum amounts of annual gross receipts required to renew a commercial use permit, and conditions under which a state commercial, mooring, launching, or any other type of use or other permit may be terminated, canceled or forfeited; and
(D) Any other rule necessary to implement this chapter pertaining to small boat harbors, launching ramps, and other boating facilities belonging to or controlled by the state;

(7) To continue the ocean recreational and coastal area programs and govern the ocean waters and navigable streams of the state, and beaches encumbered with easements in favor of the public to help foster and protect public peace and tranquility and to promote public safety, health and welfare in or on the ocean waters. The rules may include:
(A) Regulating the anchoring and mooring of vessels, houseboats, and other contrivances outside of any harbor or boating facility, including:
(i) The designation of offshore mooring areas;
(ii) The licensing and registration of vessels, houseboats, and other contrivances; and the issuance of permits for offshore anchoring and mooring of vessels, houseboats or other contrivances; and
(iii) The living aboard on such vessels, houseboats or other contrivances while they are anchored or moored within the ocean waters or navigable streams of the state.

HRS 200-6: Limitation of private use of ocean waters and navigable streams.

(a) No person shall erect or place any structure or similar

object, or sink any type of watercraft or other sizable object, or abandon any type of watercraft or other sizable object, either sunk or unsunk, on or within the ocean waters or navigable streams of the state without a written permit from the department [DLNR]. The department may require any person violating this section to remove any structure, similar object, watercraft, or other sizable object on or within the ocean waters or navigable streams of the state. If any person fails to remove the same within the time limit set by the department, the department may effect the removal and charge the person with the cost thereof. The department may enforce compliance with this section by the use of any appropriate remedy including but not limited to injunction or other equitable or legal process in the courts of the state.

(b) No person shall anchor, moor, or otherwise place any vessel, houseboat, or other contrivance on or within the ocean waters or navigable streams of the state without a permit from the department. This section shall not apply to :

(1) Vessels owned by the United States;

(2) Vessels engaged in interstate or foreign commerce; or

(3) Pleasure craft or fishing vessels anchored for a period of less than 72 hours.

HRS 200-9: Purpose and use of state small boat harbors.

State small boat harbors are constructed, maintained and operated for the purposes of:

(1) Recreational boating activities,;

(2) Landing of fish; and

(3) Commercial vessel activities.

For the purpose of this section, "recreational boating activities" means the utilization of watercraft for sports, hobbies or pleasure, and "commercial vessel activities" means the utilization of vessels for activities or services provided on a fee basis. To implement these purposes, only vessels in good material and operating condition that are regularly navigated beyond the confines of the small boat harbor, and which are used for recreational activities, the landing of fish or commercial vessel activities shall be permitted to moor, anchor, or berth at such harbour or use any of its facilities. Vessels used for purposes of recreational boating which are also the principal habitation of the owners shall occupy no more than one hundred twenty-nine berths at Ala Wai boat harbor, and thirty-five berths at Ke'ehi boat harbor, which is equal to fifteen percent of the total moorage space which was available as of July 1, 1976, at the Ala Wai and Ke'ehi boat harbors. Notwithstanding the purposes of small boat harbors, moorage for commercial vessels and commercial vessel activities is not permitted in the Ala Wai and Ke'ehi boat harbors.

HRS 266-3: General harbor rules.

(a) The director or transportation may adopt rules as necessary to:
(1) regulate the manner in which all vessels may enter and moor, anchor, or dock in the commercial harbors, ports, and roadsteads of the state, or move from one dock, wharf, pier, quay, bulkhead, anchorage, or mooring to another within the commercial harbors, ports, and roadsteads.

HRS 266-13: Dockage.

All watercraft lying idle alongside any wharf, pier, bulkhead, quay, or landing belonging to or controlled by the state, and all watercraft discharging passangers or recieving passangers or freight while made fast or lying alongside the same, shall pay to the department of transportation such rates of dockage as shall be fixed by the department.
All watercraft that receive or discharge freight or passengers (1) from or upon any wharf, pier, quay, bulkhead, or landing by meand of lighters, or otherwise, while lying at anchor or under steam in any bay, harbor, or roadstead, or (2) while lying in any slip or dock belonging to or controlled by the state shall pay such rates of dockage as shall be fixed by the department. Any watercraft that leaves any such wharf, pier, bulkhead, quay, landing, slip, dock, basin, or waters without paying it dockage and other charges, with the intent to evade the payment thereof; shall be liable to pay double rates.

HRS 266-21: Liveaboards.

(1) No more than fifteen percent of the respective total moorage space available at the Ala Wai and Ke'ehi boat harbors shall be designated for liveaboard purposes.
(2) Permit application fees, mooring fees and liveaboard fees shall be higher for non-residents of the state than for residents...and such permit application fee shall be not less than one hundred dollars for non-residents.
(3) If a vessel is used as a principal habitation, the permittee shall pay a liveaboard fee in addition to the moorage fee. The liveaboard fee shall be not less than two times the moorage fee if the permittee is a state resident, and not less than three times the moorage fee if the permittee is a non-resident.[307]

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[307] Hawaii Revised Statutes, Division 1, Title 12, Subtitle 8, Chapter 190, Section 4.5; Chapter 200, Sections 4, 6, and 9; Chapter 266, Sections 3, 13, and 21: 1993.

SELECTED REFERENCES

Althaus, Helen, Public Trust Rights, Portland, Oregon, United States Fish and Wildlife Service, 1978.

Amaral, Mark and Virginia Lee, Federal Regulations: Coastal Structures, Environmental Protection, and Boating Safety, Rhode Island, Coastal Resources Center, (1992).

Amaral, Mark and Virginia Lee, Public Rights to Coastal Waters,"Applying the Public Trust Doctrine", Rhode Island, Coastal Resources Center, (1992).

Amaral, Mark and Virginia Lee, Rhode Island State Regulations: Environmental Protection and Boating Safety, Rhode Island,Coastal Resources Center, (1992).

Bass River Associates v. Mayor of Bass River, 743 F.2d 159, (1984).

Beveridge v. Lewis, 939 F.2d 859 (1991).

Boat Owners Association of the United States, "Cross Currents", BOAT/U.S. Reports, Alexandria, Virginia, Vol. XXVII, November,(1992).

Boat Owners Association of the United States, "Judge Throws Out Anchoring Restriction", BOAT/U.S. Reports, Alexandria, Virginia, Vol. XXIX, January, (1994).

Boat Owners Association of the United States, "Uniform Anchoring Guidlines Make Headway", BOAT/U.S. Reports, Alexandria, Virginia, Vol. XXVIII, November, (1993).

Bondareff, Joan, Coast Guard Group, Committee on Merchant Marine and Fisheries, Washington, D.C., Telephone interview of March 30, (1994).

Bowen v. Hope, 37 Mass. 275, (1838).

Brindley v. Borough of Lavalette, 33 N.J. 344, (1954).

Chief, Seventh Coast Guard Dist., Memorandum #16612, Serial #1389,November 21, (1991).

Coast Guard Regulations, 33 C.F.R., Sec. 109, et. seq., (1989).

Coastal Zone Management Act of 1972, 16 U.S.C., Sec. 303 et seq.

Commander, Seventh Coast Guard District, Memorandum #16636, "Coast Guard Intervention", Serial #0874, June, (1991).

Department of Transportation Act, 80 Stat., 931, January, (1915).

Dickinson, Elaine, Boat Owners Association of the United States, Alexandria, Virginia, Telephone interview of March 16, (1994).

Docketing Office, Federal Circuit Court of Appeals, San Francisco, California, Telephone interview with leading agent, March 29, (1994).

Executive Order #12612, "Federalism", Office of the President of the United States, Washington, D.C., October 26, (1987).

Flannery, Jim, "Anchoring Rules Coming", Soundings, Essex, Soundings Publications inc., December, (1992).

Flannary, Jim, "Hawaii Suit to Block Tough New Anchorage Law", Soundings, Essex, Soundings Publications inc., January, (1993).

Gibons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

Gibson v. United States, 166 U.S. 1000, (1897).

Hager, Edwin, Editorial on municipal anchorage policy, The Longboat Observer, Florida, August 23, (1990).

Harvey, Elnora, Committee on Merchant Marine and Fisheries, Telephone Interview of Nov. 12, (1993).

Hawaiian Navigable Waters Preservation Society v. State of Hawaii, 823 F. Supp. 766, (1993).

Hawaii Revised Statutes, Division 1, Title 12, Subtitle 8: (Chapter 190, Section 4.5); (Chapter 200, Sections 4, 6, 9); (Chapter 266, Sections 3, 13, 21), (1993).

Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, (1892).

Jones, Valerie, "Concerned Boaters", Clearwater, Florida, Telephone interview of March 9, (1994).

Kaiser-Aetna v. United States, 444 U.S. 164 (1979).

Kalo, Joseph J., Coastal and Ocean Law, Houston, John Marshall Publishing Co., (1990).

King v. Oahu Railway and Land Co., 11 Haw. 717 (1899).

Kuramo v. Hamada, 30 Haw. 841, 844, (1929).

Leighty, L. "The Source and Scope of Public and Private Rights in Navigable Waters", Land and Water Law Review, Spring, (1978).

License Cases, 46 U.S. 504 (1847).

Locke v. State, 140 N.Y.S. 480, (1894).

Marks v. Whitney, 6 Cal. 3d. 251, (1971).

Matthews v. Bay Head Improvement Association, 96 N.J. 306, 471 A.2d 355, (1984).

Matson Navigation v. Hawaii Pub. Util. Comm., 742 F. Supp. 1468, (1990).

Menzer v. Village of Elkhart Lake, 51 Wis. 2d. (1971).

Merriam, Sharan, Case Study Research in Education: A Qualitative Approach, San Francisco, Jossey Bass, (1988).

Neptune City v. Borough of Avon By the Sea, 61 N.J. 296, (1972).

Nixon, Dennis, "Evolution of Public and Private Rights to Rhode Island's Shore", Suffolk Univ. Law Review, Summer, (1990).

Northwest Ordinance, 1 Stat. 50, Chapter 8, (1789).

Orion Corp. v. Washington, 109 Wash. 2d. 621 (1987), and 108 S. Ct. 1996 (1988).

Payson, Herb, "Is it Legal To Drop the Hook?", Sail, Vol. 23, no. 11, November, (1992), pp. 52-55.

Phillips, Harry, STARS, Vol. 1, No. IV, Florida, Winter, (1989), pp.2-3.

Phillips, Harry, Your Right to Anchor, Lake Park, Fla., Analemma House, (1988).

Pollard v. Hagan, 44 U.S. 212 (1845).

Ports and Waterways Safety Act, 33 U.S.C., Sec. 1221, et. seq.

Presidential Reorganization Plan No. 2, Office of the President of the United States, Washington, D.C., July 1, (1939).

Rentner v. Village of Burnham, 82 N.D. Ill. 1175, (1984).

Ray v. Atlantic Richfield, 435 U.S. 151, (1978).

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, (1947).

Rivers And Harbors Act of 1899, 33 U.S.C., Sec. 401 (1982).

Sayer v. State, 190 N.Y.S. 359, (1921).

Scudi, Morgan J.C., Scudi, Huth, Farmer & Scudi, San Diego, California, Telephone interview of March 18, (1994).

Southern Pacific Co. v. Arizona, 325 U.S. 761, (1945).

Submerged Lands Act, 43 U.S.C.S., 1301-1356, (1953).

Sweat, Ray, "Water Related Property: Creditors' Rights and Forfeiture of Title", Practicing Law Inst., Dec., (1990).

The Idaho, 29 F. 187, (1886).

United States Army Corps Of Engineers Regulations (1989), 33 C.F.R. Part 329.

United States Coast Guard, Commandant's Legal Opinion on Anchorage Policy, U.S. Department of Transportation, Washington, D.C., January, (1993).

United States Coast Guard, Maritime and International Law Division, Memorandum #16501 "Federal vs. State Regulation", U.S. Department of Transportation, Washington, D.C. Dec. 30, (1992).

United States Coast Guard, Office of Navigation Safety and Waterways Services, Memorandum on federal vs. state regulation of anchoring, U.S. Department of Transportation, Washington,D.C., Jan. 7, (1993).

United States Dept. of Transportation, Federal Port Policy in the United States, Washington, D.C., Dept. of Transportation,(1977).

U.S. v. Alabama, Florida, Mississippi, and Texas, 364 U.S. 502, (1960).

U.S. v. California, 322 U.S. 19, (1947).

U.S. v. Louisiana, 339 U.S. 699, (1950).

U.S. v. Louisiana, 364 U.S. 285, (1965).

U.S. v. Monstad, 134 F.2d 986, (1943).

U.S. v. Texas, 339 U.S. 707, (1950).

Wilkinson, Charles, "The Headwaters of the Public Trust: Some of the Traditional Doctrine", Northwestern School of Law

of Lewis and Clark College, Spring, (1989).

Wilson, James, United States Government, Lexington, Massachusetts, D.C. Heath and Company, 1989.